July 2010 e-Bulletin

MEMBER NEWS

► Clayton Utz Partner Appointment for Perth
► Fraser Milner Adds to National Securities Practice
► Muniz Launches Maritimes and Ports Law Practice

COUNTRY ROUNDUPS

► AUSTRALIA  Whiskas Purple Colour Mark Gets Up in Federal Court CLAYTON UTZ
► BRAZIL  Energy Update—Bill of Law on Compulsory Insurance TOZZINIFREIRE
► CANADA  Regulating Venture Issuers - A New Approach? FRASER MILNER CASGRAIN
► CHILE  Intellectual Property Law Modifications Law Enacted HARNECKER CAREY
► CHINA Restrictions Continue to Be Lifted on Private Investment—Access or Glass Ceiling? KING & WOOD
► INDONESIA 2010 Negative Investment Lift published - ABNR
► JAPAN Procedures for Dissolving and Liquidating a Japanese Stock Company - NISHIMURA & ASAHI
► MEXICO  Federal Law for Protection of Personal Data - SANTAMARINA y STETA
► NETHERLANDS Dutch Unbundling Act Set Aside by Court of Appeals NAUTADUTILH
► NEW ZEALAND  Securities Law Reform Announced - SIMPSON S GRIERSON
► SINGAPORE Our (Banking) Secrets are Safe For Now RODYK
► TAIWAN Rules on Taxation LEE and LI
► UNITED STATES
► IP Report—Fed Circuit Addresses Who Owes a Duty of Candor to the Patent and Trademark Office BAKER BOTTTS
► Supreme Court Limits Application of Section 10(b) and Rule 10b-5 of Exchange Act to Domestic Transactions HOGAN LOVELLS
► Health Care Reform—Early Coverage of Adult Children - Compliance Traps for Employers DAVIS WRIGHT TREMAINE
► Banking Overdraft Fees - Barbarians (and Regulations) At the Gate LUCE FORWARD
► Targeting Employers for Gender Based Pay and Promotion Discrimination: The Next Big Thing? WILSON SONSINI GOODRICH & ROSATI

MEMBER CONFERENCES & EVENTS

► PRAC 48th International Conference Kuala Lumpur Hosted by Skrine
  October 16-19, 2010

  Working Sessions include:
  One on One Meetings - series of half hour meetings among firms
  Banking - Opportunities and Challenges of Islamic Finance
  PRACtice Management - Developing Associates & Young Lawyers
  Litigation - Foreign Corrupt Practices Act Update
  IP - Business, Legal and Privacy Issues Surrounding Use of Social Media

  ● PRAC Members Gathering @ IBA Vancouver October 4, 2010
  ● 49th International PRAC Conference - Amsterdam - May 21-24, 2010

  Full reports and registration at www.prac.org/events.php

MEMBER DEALS MAKING NEWS

► ALLENDE & BREA GlaxoSmithKline Acquires Laboratorios Phoenix
► BAKER BOTTTS Represents Public Mobile Inc in CDN $350M Financing
► CAREY y CIA Advises Mitsubishi in Operation to Become Major Player in Chilean Iron Mining
► CLAYTON UTZ Advises Australian Paint Manufacturer Wattyl Limited in Acquisition by Valspur
► FRASER MILNER CASGRAIN Acts for Osisko Mining in Takeover Bid of Brett Resources
► GIDE LOYRETTE NOUEL European Commission Clears New EUROSTAR Joint Venture Subject to Conditions
► HOGAN LOVELLS Advises Zodiac Aerospace SA in Acquisition of Sell GmbH
► KING & WOOD Bank of China Completes Largest A-Share Refinancing To Date
► NAUTADUTILH Advises N.V. Deli Maatschappij On Sale of Largest Tea and Seed Traders
► RODYK Acts in Cross Border M&A Venture Capital Transaction
► TOZZINIFREIRE Advises STV Comunicações S.A. and Adelphia Comunicações S.A. ("Vicabo") Transfer to Blue Telecom 1, LLC.

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Estudio Muñiz, Ramírez, Pérez-Taiman & Olaya Abogados has announced the launching of its Maritime and Ports law practice, having incorporated Mr. Manuel Quiroga (LL.M. - Soton) as team leader.

Having over a decade’s experience in shipping law and port concessions, Mr. Quiroga has been the Chief Legal Officer of the National Ports Authority since its inception; having also been part of the National Ports Development Plan’s drafting team. Given his former position, he has acted as senior counsel for the Peruvian Government in high profile port-related matters such as the concession of Callao’s south terminal (Muelle Sur) and the Paita terminal, the largest port projects being carried out in Peru so far.

“The Peruvian ports reform started in 2003 is at its crucial stage. Peruvian public ports have never been so attractive to private operators, due to the economic and legal stability of the country and the exponential growth of international trade, despite the global crisis”, says Quiroga.

He adds, "...our Maritime and Ports law practice is truly unrivalled in the market, since we are the only firm in the country capable of integrating shipping, ports and customs law.”

Two associates, María Elena Reaño and Verónica Villena, join him in the team.

For additional information visit [www.munizlaw.com](http://www.munizlaw.com)
**FRASER MILNER CASGRAIN ADDS TO NATIONAL SECURITIES PRACTICE**

**CALGARY, July 5, 2010** – Fraser Milner Casgrain LLP (FMC), one of Canada’s leading business and litigation law firms, is proud to welcome Tim Haney as a partner in the firm’s National Securities | Corporate Finance Group. Based in Calgary, Tim’s practice encompasses all matters pertaining to securities, mergers and acquisitions, corporate finance and a wide variety of corporate transactions. Leveraging his legal expertise and keen business acumen, Tim complements our accomplished team of professionals by providing enhanced value to our firm’s clients.

FMC’s National Securities | Corporate Finance Group is recognized for providing expert and practical advice on financing, and M&A transactions in diverse industries, including oil and gas, power, mining, healthcare/biotech, technology and infrastructure to our local, national and international clients. We are very pleased to have Tim join our team, as we continue to add value and provide sound, practical and effective advice.

**About Fraser Milner Casgrain LLP**

Fraser Milner Casgrain LLP (FMC) is one of Canada’s leading business and litigation law firms with more than 500 lawyers in six full-service offices located in the country’s key business centres. We focus on providing outstanding service and value to our clients and we strive to excel as a workplace of choice for our people. Regardless of where you choose to do business in Canada, our professionals possess knowledge and expertise on regional, national and cross-border matters. FMC’s well-earned reputation for consistently delivering the highest quality legal services and counsel to our clients is complemented by an ongoing commitment to diversity and inclusiveness to broaden our insight and perspective on our clients’ needs.

For additional information visit [www.fmc-law.com](http://www.fmc-law.com)

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**PRAC MEMBER NEWS**

**CLAYTON UTZ PARTNER APPOINTMENT FOR PERTH**

**Perth, 29 June 2010:** Clayton Utz is pleased to announce the promotion of Nick Cooper to the partnership effective 1 July 2010.

Mr Cooper, who joined the firm in 2004, is a commercial litigator specialising in regulatory work, insurance, contractual disputes and medical defence. Mr Cooper has worked closely with some of the firm’s most high-profile clients across a range of industry sectors including energy and resources and health.

Clayton Utz Chief Executive Partner David Fagan said Nick’s promotion would add further weight to Clayton Utz’s formidable Litigation & Dispute Resolution team, which is recognised as a market leader.

"As a firm we are committed to excellence and to delivering an exceptional client service. Nick’s promotion recognises his outstanding legal skills and his client-focused approach."

For additional information visit [www.claytonutz.com](http://www.claytonutz.com)
GlaxoSmithKline has acquired Laboratorios Phoenix, a leading Argentine pharmaceutical business, for a cash consideration of over USD 250 million. Under the terms of the transaction, GSK will gain full ownership of Phoenix in a move to accelerate sales growth and further extend its pharmaceutical portfolio in Argentina and the Latin America region.

Allende & Brea attorneys acting in the transaction were Partners Santiago Sturla and Raúl Fratantoni, and associate Malcolm Deane.

For additional information visit www.allendebrea.com.ar

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June 24, 2010 -- On June 24, 2010 Public Mobile Inc. announced agreement of a CDN $350 million financing arrangement with Chinese telecommunications equipment manufacturer ZTE Corporation and The Export-Import Bank of China. The facility will fund construction of a wireless network spanning Public Mobile’s licensed area in Ontario and Quebec, utilizing equipment and services provided by ZTE Corporation and ZTE Canada. The facility, backed by export credit insurance from the China Export & Credit Insurance Corporation (SINOSURE), marks the first time that China Exim Bank has financed a project in North America by a domestic company.

Baker Botts represented Public Mobile Inc. in this case, with John Kuzmik, Brian Zhu and Marc Leaf as the lead lawyers.

For additional information visit www.bakerbotts.com

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Santiago: Carey y Cía. has advised Mitsubishi Corporation in the merger of its subsidiary CMH (Compañía Minera Huasco) with CMP (Compañía Minera del Pacífico), a subsidiary of CAP, and a subsequent US$401 million capital injection, resulting in the acquisition of a 25% stake valued at US$924 million in CMP.

Carey y Cía. partners, Francisco Ugarte and Juan Francisco Mackenna, led the team formed also by the associates Felipe Moro, Alberto Cardemil, Alejandra Donoso and Jorge Timmermann.

Commenting on the transaction, Francisco Ugarte said: “CMP and CMH combined economic value exceeds US$3 billion, making this merger one that will surely rank at the top of the list for M&A transactions in Chile during 2010. Considering the sizable nature of the mining operation conducted by CMP, Mitsubishi entrusted its local counsel Carey y Cía. to spearhead a full due diligence review of CMP and its subsidiaries working in close coordination with the other technical advisors retained by the Japanese trading house.”

For additional information visit www.carey.cl
CLAYTON UTZ
ADVISES AUSTRALIAN PAINT MANUFACTURER WATTYL LIMITED IN ACQUISITION BY VALSPAR

Sydney, 29 June 2010: Clayton Utz is advising well-known Australian paint manufacturer Wattyl Limited on its proposed acquisition by major American coatings manufacturer The Valspar Corporation.

Clayton Utz national M&A practice head John Elliott is leading the firm’s team advising Wattyl in its negotiations with Valspar.

Commenting on the deal, Mr Elliott said: "It continues a trend of "agreed" deals that have been occurring in recent times. This demonstrates the relative certainty (of a recommendation) that Boards can achieve in approaching prospective targets with a willingness to pay a significant premium."

Under the proposed scheme of arrangement, Wattyl shareholders will receive A$1.67 per fully paid share, valuing the transaction at approximately A$142 million.

Subject to obtaining the necessary approvals, Valspar should move to outright control of Wattyl by late September.

For additional information visit www.claytonutz.com

TOZZINIFREIRE
ADVISES STV COMUNICAÇÕES & ADELPHIA COMUNICAÇÕES ("VICABO") TRANSFER TO BLUE TELECOM 1

TozziniFreire provided assistance to Adelphi in negotiating transfer of control to Blue Telecom 1, LLC. Value of the deal is confidential.

Vi cabo operates in 14 Brazilian cities and is one of Brazil’s first cable TV operators, having participated in the bidding process for new concessions in 1999. The entrance of new investors opens new possibilities for the company in Brazil.

Tozzini Freire team acting in the transaction Marcela Waksman Ejinisman – partner; Regina Ribeiro do Valle – partner; Fernando Cinci Avelino Silva - associate and Ana Cristina Izu – associate

For additional information visit www.tozzinifreire.com.br

KING & WOOD
BANK OF CHINA COMPLETES LARGEST A-SHARE REFINANCING TO DATE

On June 18, 2010, Bank of China Co., Ltd. ("Bank of China") issued and listed A-share convertible bonds (Ticker:113001) on the Shanghai Stock Exchange at an offer price of RMB 100 per bond raising approximately RMB 40 billion.

This issuance of convertible bonds was prioritized to existing A-share-holders except the controlling shareholders. The remaining bonds (including the issuance volume not subscribed by existing A-share-holders) were offered to institutional investors and individual investors through the Shanghai Stock Exchange Trading System. In the face of challenging market conditions, this issuance was competitively sought after with institutional investors subscribing to approximately RMB 1,698 billion and individual investors subscribing to approximately RMB 36.4 billion.

This issuance marked several market records including the largest A-share refinancing project to date, the largest A-share convertible bond issuance to date (where the total market volume of the A-share convertible bonds prior to the issuance was less than RMB 10 billion) and the first successful capital increase through refinancing on the A-share capital markets by a ‘Big 5’ state-owned commercial bank.

King & Wood advised the issuer. Our team was led by Zhou Ning, a partner with our Securities & Capital Markets Group.

For additional information visit www.kingandwood.com
RODYK & DAVIDSON
ACTS IN CROSS BORDER M&A VENTURE CAPITAL TRANSACTION

Rodyk acted advised and assisted nine sellers including two venture capital firms, Sofinnova Partners and Walden International, in a cross border M&A involving the sale of all their shares (preference and ordinary) in Sprice Pte Ltd to Travelport (Bermuda) Ltd. The transaction value is undisclosed.

Travelport is one of the world’s leading global distribution system (GDS) providers and the Singapore-based Sprice Pte. Ltd. (with a subsidiary in France) owns and operates hotel and travel search engine Sprice.com (http://www.sprice.com). As a result of the deal, Travelport will significantly expand its hospitality offering by providing Galileo and Worldspan-connected agents with access to Sprice’s portfolio of over 240,000 international hotel proper ties, as well as a comprehensive suite of hotel reviews, merchandising options and comparison tools. Travelport will also utilise Sprice’s proven search technology to enhance its GDS channels, enabling the company to deliver and distribute richer, more diverse supplier content to its subscriber customers.

This transaction was led by corporate partner S. Sivanesan assisted by senior associate Sunil Rai.

For additional information visit www.rodyk.com

NAUTADUTILH
ADVISES N.V. DELI MAATSCHAPPIJ ON SALE OF LARGEST TEA AND SEED TRASERS

NautaDutilh is advising N.V. Deli Maatschappij on the sale of tea trader Van Rees and seeds trader Red River to Amsterdam Commodities N.V. (Acomo) for about EUR 100 million.

As a result of this acquisition, spice trading house Acomo will double in size and gain a leading market position in the tea and seeds trade.

Part of the acquisition price (EUR 40 million) will be financed by a subordinated convertible bond loan. In addition, Acomo will receive a takeover loan from ING Bank, issue 1.5 million of new shares and pay EUR 7 million from existing cash resources.

After the sale, Deli will hold a 8.4% stake in Acomo. Furthermore, Deli will participate in the convertible bond issue for EUR 5 million.

The NautaDutilh team advising Deli consists of Jeroen Preller, Nienke van der Meer, Jorieke van Strijen and Daniëlle Hahn.

For additional information visit www.nautadutilh.com

HOGAN LOVELLS
ADVISES ZODIAC AEROSPACE SA IN ACQUISITION OF SELL GMBH

Hogan Lovells advised Zodiac Aerospace, a Euronext Paris-listed company, one of the main players in the aerospace equipment and systems sector, on its agreement to buy Sell GmbH (“Sell”) from the Premium Aircraft Interiors Group (“PAIG”). This transaction, which remains subject to the authorization of the antitrust authorities, is expected to close by the end of 2010.

Sell is a leading designer and manufacturer of premium aircraft galleys and galley insert equipment and provider of associated services for the global commercial aerospace industry. Sell is based in Herborn, Germany and has 1,250 employees. The company generated revenues of €179 million in 2009.

This transaction will reinforce Zodiac Aerospace's worldwide leadership position in cabin Interiors and will enable Zodiac Aerospace to propose a full and competitive range of products to airlines and aircraft manufacturers.

Jean-Marc Franceschi, partner, and Edouard Eltvedt coordinate the Hogan Lovells team, which includes Philip Watkins, partner, and Jo Ede in London, Dirk Besse, partner, Wolfgang Kircher, counsel, and Angelika Schwetzler and Michel Debroux, partner, for the antitrust aspects.

PricewaterhouseCoopers also advised Zodiac Aerospace while Rothschild intervened as advising banker.

For additional information visit www.hoganlovells.com
Gide Loyrette Nouel advised SNCF:

On 17 June 2010, the European Commission approved the creation of the "New Eurostar" joint venture by French incumbent railway operator SNCF and London Continental Railways (LCR), the rail company that controls Eurostar operations in the United Kingdom through its subsidiary EUKL. Eurostar is currently the only provider of passenger rail services between London and Brussels and London and Paris.

Before this transaction, Eurostar was run by a cooperation between SNCF, EUKL and the Belgian national railways SNCB. Following its creation, "New Eurostar" will become a stand-alone independent joint venture, controlled by SNCF and LCR. SNCB will retain a non-controlling stake in the joint venture.

The Commission cleared this transaction subject to a certain number of remedies to ensure that new operators have access to the network's routes.

To address the Commission's concerns about the project as initially notified, the parties offered innovative commitments to ensure effective access for new operators to the existing infrastructure so as to offer an increased alternative offer of services to passengers.

The Commission concluded that the transaction, as modified by these commitments, will not raise competition concerns and will help to secure the benefits of the liberalisation of international passenger rail services.

Gide Loyrette Nouel advised SNCF on the creation of the joint venture and its notification to the European Commission. The team comprised Serge Tatar and Antoine Lelong for Mergers & Acquisitions aspects, Stéphane Hautbourg, Benoît Le Bret, Laurent Godfroid and Ségoîène Pelsy for competition law issues.

For additional information visit www.gide.com

FRASER MILNER CASGRAIN

ACTS FOR OSIKO MINING IN TAKEOVER BID OF BRETT RESOURCES

On May 19, 2010, Osisko Mining Corporation ("Osisko") was successful in its offer to acquire Brett Resources Inc. ("Brett") by way of takeover bid, with a total of 88,295,814 common shares of Brett having been validly deposited at the expiry time of the offer representing approximately 77.28% of Brett's issued and outstanding common shares. Osisko offered shareholders of Brett 0.34 of an Osisko common share for each common share of Brett held.

The consideration under the Offer represented a premium of 52.5% using the 20-day volume weighted average prices of Osisko and Brett on the TSX and TSX Venture, respectively for the 20 trading day period ending March 16, 2010 (the last trading day prior to the announcement of the transaction).

The value of the total consideration offered to the Brett shareholders was approximately $372 million calculated on a fully-diluted basis. The boards of directors of both companies unanimously approved the transaction and the board of directors of Brett recommended that its shareholders tender to the Osisko offer.

Osisko is currently developing the Canadian Malartic gold deposit and evaluating adjacent areas for a large-scale open pit, bulk-tonnage mining operation. The Canadian Malartic deposit currently represents one of the biggest gold reserves in Canada for a single deposit, and is still growing through ongoing drilling on new mineralized zones.

Osisko was represented by Fraser Milner Casgrain LLP with a team that included John Sabine, Linda Misetich, Sander Grieve, Ralph Shay, Eric Foster and Liz Fraser (securities), Zahra Nurmohamed and Matt Peters (tax).

For additional information visit www.fmc-law.com
-- Landmark DMCA Victory in Viacom Litigation

On June 23, 2010, Judge Louis Stanton of the U.S. District Court for the Southern District of New York granted Google's motion for summary judgment in a $1 billion copyright lawsuit filed by Viacom and a group of putative class action plaintiffs, including the Premier League (the top English soccer league) and the National Music Publishers Association. Wilson Sonsini Goodrich & Rosati represented Google and YouTube throughout these high-profile matters.

The plaintiffs brought claims against Google and YouTube for direct and secondary copyright infringement based on YouTube's hosting of content posted to the service by its users. YouTube argued that it is immune from infringement liability because it qualifies for the protection of the § 512(c) safe harbor of the Digital Millennium Copyright Act (DMCA). The parties cross-moved for summary judgment. In his decision, Judge Stanton agreed with YouTube and granted summary judgment "against all of plaintiffs' claims for direct and secondary copyright infringement." The summary judgment opinion can be found here http://www.google.com/press/pdf/msj_decision.pdf and Google's summary judgment papers can be found here http://www.google.com/press/youtube_viacom_documents.html.

Of particular significance to the court was YouTube's responsiveness to copyright holders' notices of alleged infringement sent pursuant to the DMCA. The court concluded that YouTube's conduct demonstrated "that the DMCA notification regime works efficiently." The court also held that "[g]eneral knowledge that infringement is 'ubiquitous' does not impose a duty on the service provider to monitor or search its service for infringements" and affirmed that copyright owners are best positioned to identify allegedly infringing content online. In addition, the court distinguished the U.S. Supreme Court's 2005 Grokster decision, noting that YouTube's DMCA compliance was antithetical to Grokster-style inducement liability.

Judge Stanton's opinion validates the operations of many leading Internet companies that provide access to materials uploaded by users. The court's order establishes that an online service that works cooperatively with copyright owners, installs a rigorous DMCA compliance regime, and removes specific content identified as allegedly infringing is entitled to a safe harbor from copyright liability.

The Wilson Sonsini Goodrich & Rosati team representing Google in this matter is led by David Kramer, Maura Rees, Michael Rubin, and Bart Volkmer.

For additional information about the YouTube decision, the Digital Millennium Copyright Act, or assistance with your company's Internet strategy, please visit contact David Kramer at (650) 320-4741, Maura Rees at (650) 320-4780, or Michael Rubin at (650) 849-3311.

For additional information visit www.wsgr.com

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PRAC e-Bulletin is published monthly. Member Firms are encouraged to contribute articles for future consideration. Send to editor@prac.org. Deadline is 10th of each month.
Whiskas purple colour mark gets up in Federal Court

Key point: Mars worked hard to give the Whiskas colour the capacity to distinguish its products from those of other traders.

Having invested a lot of time, money and effort into creating a brand identity, can you successfully register a particular colour as a trade mark under the Australian Trade Marks Act? Yes, as the recent decision involving the colour purple and Whiskas cat food shows (Mars Australia Pty Ltd (formerly Effem Foods Pty Ltd) v Société des Produits Nestlé SA [2010] FCA 639).

Mars, the owner of Whiskas, developed a particular shade of purple, Whiskas Purple (CMYK: cyan 40%, magenta 100%), and began applying it to the Whiskas range of cat food packaging and collateral marketing materials. It then applied to register the Whiskas purple colour as a trade mark.

Nestlé initially opposed the registration, but later dropped its opposition in the final stages of the Federal Court appeal. Justice Bennett in the Federal Court still had to consider if the Whiskas colour purple was capable of distinguishing Whiskas products either because:

- it was, or was to some extent, inherently adapted to distinguish Whiskas cat food from other brands of cat food; or
- if the mark was not inherently adapted to distinguish, the evidence established that the trade mark did in fact distinguish Whiskas products as at the filing date and was therefore capable of distinguishing those goods.

Why did Whiskas purple function as a trade mark?

Justice Bennett found that at there was evidence that Whiskas Purple was at the application date capable of distinguishing Mars’ goods:

- Whiskas Purple was an invented colour, designed specifically for Mars for its cat food range;
- Whiskas Purple and its association with Whiskas was extensively promoted and advertised before and after the application date, with the clear intention of giving that colour a trade mark significance, that is, to have it act as a badge of origin
- the use of purple by other traders on pet food had not been trade mark use, but mostly had been to indicate different varieties within a product range, and registration would not prevent such non-trade mark use by other traders in the future
- other traders acting without improper motive would not be likely to want to use that shade of purple, or some colour nearly resembling it, upon or in connection with their own goods in any manner that would infringe the Mars mark
- a survey in May 2009 indicated that Whiskas Purple did function as a trade mark, a badge of origin by which consumers identified Mars’ goods as against the goods of other traders.

What does this mean for brand owners?
The protection given to colour marks is still relatively new in Australia, and has at times given rise to very public disputes, most notably, Cadbury’s (as yet unsuccessful) attempts to gain exclusivity over use of the colour purple for chocolate.

This decision should act as an encouragement to brand owners to consider protecting non-traditional marks such as colour and shapes. Nevertheless, registration of a single colour as a trade mark will not be easily obtained and it will be critical for applicants to develop a strategy that will ensure that distinctiveness can be proven.

For further information, please contact Mary Still or Brett Doyle.

Disclaimer
Clayton Utz communications are intended to provide commentary and general information. They should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this bulletin. Persons listed may not be admitted in all states.
ENERGY - RECENT NEWS

Relevant News:

• Bill of Law on Compulsory Insurance

The Committee of Constitution, Justice and Citizenship of the House of Representatives gave its approval to Bill of Law No. 4,286/04. By amending Law No. 7,369/85, which establishes the payment of an additional salary for employees in the power sector who work under hazardous conditions, the Bill provides for a compulsory insurance against personal accidents. The Bill is still pending final approval in the House of Representatives before being submitted for the Senate.

• Transmission Lines Auction

The first 2010 auction of transmission lines was held on June 11. The auction had an average discount of 31.57%, and 6 out of the 9 transmission lines negotiated in the auction were sold to state-owned companies. The lines have a total of 11 substations and an extension of 708 km, passing through seven Brazilian states. The expected investment is R$ 700 million.

Legislation and Regulation:

• Regulation of the Alternative Sources Auction

Ordinance No. 565/10 of the Ministry of Mines and Energy (MME) approved the guidelines and systematic for the Alternative Sources Auction to be held on August 19. The Ordinance details the operational procedures for participation in the auction. Small hydroelectric power plants (PCHs) and generation projects from biomass and wind sources may participate in the auction. The power negotiated by PCHs will be subject to a power purchase agreement in the regulated market (CCEAR) in the modality of quantity of energy, with supply start-up in 2013 for 30 years. The power from wind and biomass sources will be subject to a CCEAR in availability of energy modality, with start-up supply in 2013 for 20 years.

• Regulation of the Auction for New Generation Projects

Ordinance MME No. 587/2010 approved the systematic for the auction to purchase electric energy from new generation projects. The auction will be specific for hydroelectric generation projects, including small hydroelectric plants (PCHs), and the projects with concession in the isolated system. The power from such projects will be subject to a CCEAR in the modality of quantity of energy, with a term of 30 years.

• Amendments on Energy Supply by Distributors

The National Electricity Energy Agency (ANEEL) made available the final draft of the new ANEEL Resolution No. 456/00, which details the General Conditions for Power Supply. The draft consolidates the rules related to the quality of power supply and the rights and obligations of power distribution concessionaires and consumers. The changes are the result of a public hearing held in 2008 and extensive discussion with industry players over the last ten years. The draft will now be submitted to the approval of ANEEL’s board.
• **Change in the Fuel Consumption Account (CCC)**

ANEEL Resolution No. 401/10 changed ANEEL Resolution No. 347/09 in relation to the amounts to be collected by distribution concessionaires to the Fuel Consumption Account (CCC).

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REGULATING VENTURE ISSUERS – A NEW APPROACH?
BY IRENE LUDWIG AND KEITH INMAN


Multilateral Consultation Paper 51-403 – Tailoring Venture Issuer Regulation (“MCP 51-403”) – seeks input on whether the current venture market regulatory regime could be updated to enhance investor protection, reduce regulatory costs for venture issuers and allow management to focus more attention on business development.

Some of the key features of the consultation paper include:

• eliminating the requirement for three- and nine-month interim financial statements and associated management’s discussion and analysis (“MD&A”);

• introducing an annual report that would provide streamlined and simplified disclosure of the venture issuer’s business, management, governance and executive compensation, and would include the venture issuer’s annual financial statements and MD&A;

• enhancing investor protections through substantive corporate governance requirements, including requirements to implement procedures to: (i) address conflicts of interest and related party transactions; and (ii) reduce the risk of trading when undisclosed material information exists;

• eliminating business acquisition reports and enhancing material change reporting; and

• making changes to prospectus disclosure requirements.

The securities commissions are accepting written comments on these proposals until September 17, 2010. In addition, consultation sessions will be held across Canada beginning in June 2010 to solicit feedback from venture market participants.

A copy of MCP 51-403 and more information on how you can participate in the consultation process can be obtained by visiting the Alberta Securities Commission webpage.

CONTACT US

For further information, please contact a member of our National Securities | Corporate Finance Group.
The recent IP Law Modification refers primarily to three aspects:

1° It provides for a new liability regime for Internet Services Providers (hereinafter “ISP”).

2° It sets forth new causes of actions and proceedings against piracy.

3° It introduces a new set of exceptions to Intellectual Property rights.
1. New liability regime for ISPs

The IP Law Modification incorporates a whole new chapter III to Title IV of the IP Law, following very closely the IP chapter of the Free Trade Agreement signed between USA and Chile. For the first time the law provides for certain limitations to ISP’s liability in case of IP violations committed through their networks and systems. Application of these new rules shall be without prejudice of the application of the general rules on civil liability.

IP Law Modification sets a new rule, upon which the ISPs shall be exempt from having to compensate IP rights owners in case of damages suffered by these owners due to actions committed through the ISP’s networks, provided the ISPs fulfill certain conditions. These conditions may vary depending on the service provided.

In order to fall into this safe harbor framework, ISPs must:

a) Have established public and general terms upon which they may exercise their right to terminate their agreements with content providers that are judicially qualified as repeated offenders against the IP rights protected by law;

b) Not interfere with the technological measures of protection and rights management of protected works that are widely acknowledged and legally used, and

c) Not have generated nor have selected the content or its addressees. Additionally, said ISPs must adhere to other conditions, specific for each service they provide. For said purpose, the law distinguishes between:

a) data transmission, routing or connection supply service providers;

b) temporary automatic data storage; and
c) service providers that, upon user request, store data in their networks or systems, either by themselves or third parties, or provide services that include search, linkage or reference to Web sites by means of search engines, including hyperlinks and directories.

In order to properly observe the constitutional rights of privacy and safety of communications, a prohibition of surveillance or oversee data is also imposed. Service providers are not required to perform active searches of illicit activities nor supervise the content of data transferred, stored or referenced.

A special, brief and summary proceeding is also set forth in order to safeguard IP rights against violations committed through networks or digital systems. These proceedings include measures destined to withdraw, disqualify or block infringing content in the ISP’s network or systems. In this matter, Chilean law opted for the judicial notification system, a process in which the order to withdraw contents from the web is preceded by a judicial analysis of the existence of any infringement. This system is different from the American notification system, upon which the affected party may notify the ISP of the existence of the violating content.

The law also provides for the right of IP owners to judicially request the delivery of necessary information to identify the provider of infringing content.

2. Piracy Countermeasures

The current regime of civil and criminal offenses of IP rights is considered inadequate by many. The increase of piracy in Chile, which keeps it in the priority watch
list in the “2010 Special 301 Report”\(^1\) prepared by the US Trade Representative Office, brought about the need to modernize the tools that would allow a better protection for the IP owners, establishing effective measures against violations commonly referred to as piracy by means of civil and criminal actions.

Specifically, there is the intention of fighting piracy and unauthorized uses by means of more and better legal actions for use in the investigation and harsher punishment for the offenses. This should be a very relevant issue for the international public opinion, since piracy in Chile doubles that of the OCDE country members, according to the Business Software Alliance.\(^2\)

The IP Law Modification sets out a new chapter of civil and criminal sanctions to the infringement of IP rights and derivative works, as well as new mechanisms and procedural tools to be used in case of uses outside the legal framework.

This chapter stands out because of the reunion of several different criminal offenses, which used to be dispersed throughout the regulation. New offenses are incorporated as well, with penalties graduated according to the damage inflicted,

\(^1\) This report states that Chilean’s IP performance is way below the expectations of a free trade agreement partner.

therefore introducing objective factors that allow a more fair sanction. The supplementary sanction for not categorized violations is kept, which corresponds to a fine of 5 to 50 UTM.

In general terms, the criminal penalties are also kept, but the amount of the fines is heavily increased, leveling with those established in the Industrial Property Law.

The IP Law Modification describes as offenses:
- Any unauthorized use of IP protected works and interpretations, productions and broadcastings of derivative works.
- Forgery of literary, scientific or artistic works protected by law; of execution charts; of the number of effectively sold copies; of standing to authorize the use of IP rights or licenses regarding performances or interpretations of private domain sound recordings.
- Plagiarism of IP protected works, whenever the author’s name is changed or deleted or the title of the work or its text is maliciously altered.

- Omission to make execution charts by those obliged to pay retribution based on the use of IP rights or derivative works, whenever those charts are necessary for the collective management of IP rights; and the forgery or adulteration of said execution charts and certain data in the state of account.

Piracy is a central element in this modification, seeking to substantially improve the legal framework applicable to individuals and criminal organizations dedicated to the illegal manufacture, distribution and marketing of products or creations. Therefore, a specific criminal regulation is established in case of piracy, increasing up to two degrees
the maximum penalty applicable. The law distinguishes the marketing of illicit copies or protected works from those who, with intent to make a profit, manufacture, import, have or acquire for commercial distribution or rental purposes said illicit copies. Repeated offenders are strongly penalized.

Procedural means and mechanisms in the law are perfected. The IP owner’s right to exercise actions destined to cease the illicit activity, indemnify economic and moral loses and publish the subsequent judgment is recognized. As per request of said owner, the offending goods shall be destroyed or set aside from commerce and illicit copies can only be destined to charitable work with the express authorization of the IP owner.

New preventive measures destined to cease the illicit activity are granted. These may be ordered in any stage of the trial and have to be requested by the party. Under certain conditions, these measures may be requested on a pre-judicial basis.

In order to calculate the compensation, the affected party may choose between the remuneration the offender should have paid to the IP owner in order to acquire a proper license or the profits lost due to the infringement. The legitimate sale value of the infringed goods shall be taken into account in order to determine the pecuniary damage. In regards of the determination of moral damage, the judge shall consider the circumstances of the infringement, the seriousness of the damage and the objective degree of illicit spreading of the work.

3. New Exceptions to IP rights

The introduction of this chapter was motivated by the interest to balance the IP owner’s rights with the rights of the community as a whole to legally access the protected creations. Therefore, a series of limitations and exceptions within the legal framework were included, which grant access to cultural goods and the legitimate exercise of fundamental rights by the community, just as it is recognized in most countries.
These exceptions shall be applicable to IP rights and to derivative works when appropriate.

The right to quote is extended and more thoroughly detailed, being the purpose of the use of the fragment the main criterion. Right to quote may be used for criticizing, illustrating, teaching or investigative purposes.

Neither authorization nor payment shall be required, as long as the source, work’s title and author’s name are mentioned.

A new exception is set forth regarding the visually and hearing handicapped, as well as other kind of disabilities. Within this exception, the reproduction, adaptation, distribution and public communication of protected works is permitted, as long as there is no commercial interest and is always performed within the scope of people suffering the respective disability.

Some anachronistic expressions are replaced, bringing about technological neutrality, like exceptions for libraries and archives, exceptions for educational purposes, exceptions applicable to satire and comedy, along with exceptions for computer software. Among the latter, two new exceptions are added in compliance with the US free trade agreement. Said exceptions protect reverse engineering activities executed upon legally acquired software, with the sole purpose of achieving operative compatibility between software or for investigative and research purposes. On the other hand, activities executed with the sole purpose of testing, investigating or correcting the operation or security of the computer in which the software is installed, are also protected.
A temporary copy exception is also added. This exception is subject to compliance with certain and specific conditions regarding its use, always within the framework of technological proceedings application.

Finally, the removal of article 45 bis must be emphasized, which established the so-called “three step rule”, which is included in the Bern Convention and the TRIPS agreement of the World Trade Organization. This rule had been drafted as an imposition of additional conditions for the compliance of the old exceptions. Such removal was made with the intention to provide a more objective nature to the exceptions regime, thus avoiding the uncertainty caused by the need to provide additional explanations of such conditions.
China Continues to Lift Restrictions on Private Investment
— An Access or a Glass Ceiling

By Zhang Yi * and Ge Jiaying **
China Bulletin June 2010

On May 7, 2010, the State Council issued the _Opinions on Encouraging and Guiding the Healthy Development of Private Investments_ ("Opinions"), proposing to open more industries sectors to private investors and encourage private capital to make investments into areas and industries where the existing PRC law does not expressly prohibit private investment. As some of the industries are currently monopolized by state-owned enterprises ("SOEs"), the _Opinions_ undoubtedly provide good news for private equity funds and other private investors in China.

I. Private Capital Faces Substantial Investment Restriction

Although China’s private investment has seen substantially growth with the rapid economic development of China, private investors still face an uphill battle.

First, there is no complete market access for private investors. The existing investment laws and regulations are silent on certain limited industries and areas in which private capital should be restricted. However, in practice, to achieve macroeconomic control, relevant government authorities tend to be very prudent and apply a more stringent standard than those applied to state-owned investors when evaluating and approving private investment projects. Therefore, this drastically decreases the chance that a private investment project will get approved. Statistics show that state-owned capital is permitted to enter 72 of the 80 industries in China, foreign capital is allowed in 62, and private capital has access to only 41.¹

Second, the existing monopoly makes it difficult for private investors to compete with SOEs. In some basic industries, SOEs monopolized for many years and continuously enjoyed preferential treatments, and thus the likelihood that private capital may enter in these industries is very slim unless the private investors are protected by special policies.

Third, as relevant investment laws and regulations lack authorities regarding private investment, private investors are vulnerable to the changes of investment policies. For example in Shanxi province, a group of private investors from Zhejiang province invested in small and medium-sized coal mines² were substantially affected by the confusion of policies. As the existing PRC law is ambiguous about the ownership of mineral rights, private investments have to rely heavily on the implementation of local policies. However, once the local governments change their policies, such changes are likely to have a significant impact on private investments.

Investment restrictions have forced excessive private capital into the securities market and the real estate market, where private investors hope to profit from securities or property speculation. Unfortunately, these speculative transactions resulted in economic bubbles and social problems.

II. The Encouraged Industries

According to the Opinions, the State will encourage private investments in projects in various industries and areas, including the basic industries, infrastructures, public utilities, policy-related
housing projects, public service, financial service, trade-related business management and logistics, national defense science and technology.

A. Basic Industries

Private capital is encouraged in the transportation industry. A private investor may fund the construction of highways, ports, and civil airports as a sole owner, controller, or shareholder of the project company. The Opinions also encourage the investment of private capital in the building of railway by equity participation. According to the Opinions, the State will also try to broaden the scope of private capital investment in railway industry.3

Private investors are encouraged to invest in power industry as well. Investable items include the construction of hydropower, thermal, and nuclear power plants as a sole owner, controller, or shareholder of the project company.4 Private investors are also welcomed to invest in the oil and gas industry, especially joint exploration of oil and gas with the SOEs.5 Like railway industry, private investors are encouraged to invest in fundamental telecommunication operation by equity participation.6

It is worth noting that before the promulgation of the Opinions, these industries were monopolized by SOEs, market entry was almost non-existent for private capital.

B. The Real Estate Industry

The Opinions encourage private investors to participate in the bidding of land rehabilitation, land reclamation, and other similar projects.7

The Opinions also invite private capital to invest in the construction of policy-based housing projects. The State will support and provide guidance to the participation of the private capital in affordable housing and public rental housing projects. Private investments in these projects are entitled to the preferential policies for policy-based housing projects.8

C. Financial Service Industry

In the financial service industry, private investors are encouraged to increase the registered capital of commercial banks and participate in the restructuring of the rural and urban credit cooperatives. Private investors can also take part in establishing village banks, financing companies, rural credit union funds, credit guarantee companies, and financial service providers.9

In addition, the State will continue to lift the restrictions on the percentage of shareholding by private investors in the financial institutions, simplify the bad debts review, and writing off procedures applicable to small and medium-sized financial institutions. Moreover, the State will offer financial subsidies to companies providing agriculture-related small business loans which resemble those provided to rural banks.10

III. Other Supportive Measures

With improving the investment environment in its mind, the Opinions adopt a series of measures to encourage and direct private investments into more areas and industries. These measures include:
A. Abolishing and amending regulations and policies that impede the growth of private investment;\textsuperscript{11}

B. Providing additional financing support to private investment by establishing a sound financing guarantee system, improving venture capital investment mechanism and environment, promoting the development of equity investment funds, and encouraging private companies to obtain financing from the stock and bond markets;\textsuperscript{12}

C. Consolidating matters subject to administrative approval and streamlining relevant procedures.\textsuperscript{13}

IV. Comments

In 2005, the State Council introduced the \textit{Opinions of the State Council on Encouraging, Supporting and Guiding the Development of Proprietary, Private and Other Types of Non-Public Economy}, also known as the “36 policies for non-public economy”. Compared to the 36 policies for non-public economy, which provided general principles for private economy, the \textit{Opinions} are geared towards investment-related issues. With more detailed rules, the \textit{Opinions} may provide better guidance and directions to private investors.

However, similar to the 36 policies for non-public economy, the \textit{Opinions} are just general policies. Despite offering investment opportunities and incentives to private capital investment, the implementation of these policies and incentives are contingent on more definitive rules and regulations. Otherwise, private investments will once again back to square one.

(This article was originally written in Chinese, the English version is a translation.)

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\textsuperscript{2} In 2009, Shanxi province issued a number of documents, including the \textit{Opinions of Shanxi Provincial Government on Accelerating the Implementation of Merger and Restructuring of Coal Mines} and the \textit{Circular of Shanxi Provincial Government on Issues Relating to Acceleration of Merger and Restructuring of Coal Mines}. These documents aim to consolidate the small and medium-sized coal mines in Shanxi. The legal nature of mineral rights is unique and the existing PRC law is unclear regarding how these rights should be priced when the owner transfers them. When Zhejiang investors had to sell their mineral rights to state-owned companies upon the issuance of the said new policies at below market price, these investors suffered severe losses from the change of policy climate.

\textsuperscript{3} See Article 5 of the Opinions.

\textsuperscript{4} See Article 7 of the Opinions.

\textsuperscript{5} See Article 8 of the Opinions.

\textsuperscript{6} See Article 9 of the Opinions.

\textsuperscript{7} See Article 10 of the Opinions.

\textsuperscript{8} See Article 13 of the Opinions.
9 See Article 18 of the Opinions.
10 See Article 18 of the Opinions.
11 See Article 29 of the Opinions.
12 See Article 31 of the Opinions.
13 See Article 32 of the Opinions.
The Indonesian Government finally published the long awaited new Investment Negative List. The new list, issued on 25 May 2010 under Presidential Regulation No. 36 of 2010 (“2010 Negative List”), sets out the lines of business that are closed to investment as well as those that are open to investment under certain conditions. The two business line categories are respectively listed in the regulation’s Attachment 1 and Attachment 2.

The following are the provisions worth highlighting:

1. The lines of business that are open to investment but subject to certain conditions are:

   - the lines of business that are reserved for micro, small, medium enterprises and cooperatives;
   - the lines of business for which a partnership is required (kemitraan);
   - the lines of business for which certain shareholding arrangements are required;
   - the lines of business that may be conducted only in certain locations;
   - the lines of business for which a special license is required.

2. The 2010 Negative List does not apply to investments that were already approved prior its issue, unless the terms of the 2010 Negative List are more favorable to the investor.

3. The 2010 Negative List does not apply to indirect investments or to portfolios of which the transactions are made through the domestic capital market/stock exchanges.

4. In the event of a shareholding change which is the result of a merger, acquisition, or consolidation of investment companies having the same line of business, the maximum foreign shareholding is:

   - In the case of a merger, as stipulated in the investment license of the surviving entity.
   - In the case of an acquisition, as stipulated in the investment license of the acquiring company.
   - In the case of a consolidation, as stipulated in the investment license of the new company being the result of the consolidation.

5. The pre-emptive right provisions under the Indonesian Company Law will apply in the case where a foreign investment company wishes to expand its business by increasing its capital through a rights issue. If the Indonesian partner/domestic investor is not able to participate and as a result the foreign shareholding exceeds the
limit set out in the investment license, a mandatory divestment must be made within 2 years by selling the shares to Indonesian nationals, by offering the shares to the public, or by repurchase of the shares by the investment company, until the limit is complied with.

6. The provisions of this regulation do not prejudice the provisions of regulations on business activities that have been issued by governmental technical departments or by a regional government.

7. The 2010 Negative List also sets out conditions of foreign ownership and/or location for investors from ASEAN countries. These conditions are given to implement Indonesia’s commitment in investment related to the ASEAN Economic Community.

8. The 2010 Negative List replaces the previous Negative List issued in 2007.
I. INTRODUCTION

In light of the current economic landscape, we are often asked by our foreign corporate client to proceed with the dissolution and liquidation of its Japanese subsidiary. There are unique procedures under Japanese corporate law that need to be followed for dissolving and liquidating a Japanese stock company. This newsletter outlines such procedures in two parts: dissolution and liquidation.

II. DISSOLUTION

Under the Companies Act of Japan (the “Companies Act”), a Japanese stock company may adopt to dissolve itself by a special resolution at a shareholders’ meeting by obtaining no less than two-thirds of the votes of shareholders who are present at such shareholders’ meeting; the Companies Act further requires that shareholders, who hold a majority of votes of shareholders entitled to exercise their votes, must be present at such shareholders’ meeting. Upon dissolution of the stock company, its director(s) will cease to serve in such directorial capacity and such former director(s) will become the liquidator(s) of the stock company by default, unless otherwise provided for in its Articles of Incorporation or determined by a resolution at the shareholders’ meeting. For the purposes of this newsletter, the plural term, “liquidators,” will be used; however, it is permissible for the stock company to have just one liquidator.

After the stock company is dissolved, it will continue to exist as a corporate entity. However, its sole purpose will be to liquidate itself. In other words, the dissolved stock company is not able to operate its business in the same manner as it did prior to the dissolution.

When shareholders have decided to dissolve the stock company, the stock company must register its dissolution at the Legal Affairs Bureau of Japan (the “Bureau”) which has proper jurisdiction over the principal office of the stock company. This registration must be completed within two weeks from the effective date of the dissolution. Please note that such registration per se is not a precondition to dissolve the stock company. After the stock company completes its dissolution registration with the Bureau, it is necessary for the stock company to file a report with competent tax offices regarding the dissolution.

III. LIQUIDATION

Once the stock company is dissolved, it will then proceed to liquidate itself. Liquidation is a procedure for the stock company to wind up its affairs and eventually cease to be a corporate entity. During this process, liquidators will act as representatives of the stock company, replacing such representatives who were the stock company’s Representative Directors before the dissolution.

Liquidators must register their names with the Bureau, and if such formation is required by the Articles of Incorporation of the stock company, a Board of Liquidators composed of three or more liquidators must be formed. If directors of the stock company become liquidators, such event must be registered with the Bureau within two weeks from the date of dissolution. Alternatively, if persons other than directors are appointed as liquidators, such event must be registered with the Bureau within two weeks from the date of such appointment.

The following sets forth certain responsibilities and obligations of liquidators in chronological order. Please note that liquidators representing the stock company are authorized to conduct all activities for the stock company in connection with such responsibilities:

1. Liquidators must review the financial conditions of the stock company and prepare without delay (a) a list of properties owned by the stock company and (b) a balance sheet of the stock company. Both documents must be submitted at a shareholders’ meeting for their approval.
2. Liquidators are responsible for winding up the affairs of the stock company, collecting the debts owed thereto, performing its obligations, and disposing of its assets.

3. After the dissolution is approved at a shareholders’ meeting, liquidators are required to give public notice of its liquidation to the stock company’s creditors without delay. In this notice, liquidators must instruct creditors to submit their claims within a specified time period which shall be no less than two months from the date of such public notice (the “Submission Period”). In the public notice, liquidators must also warn the creditors that failure to submit their claims within the Submission Period will result in creditors being excluded from liquidation proceedings.

4. In addition to the above notice, liquidators must separately notify all creditors known to the stock company to submit their claims, provided that liquidators cannot exclude the known creditors from the liquidation proceedings even if such creditors fail to report their respective claims.

5. Liquidators may pay off obligations of the stock company when the Submission Period expires. Under limited cases, however, liquidators are permitted to pay off obligations of the stock company prior to the expiration of the Submission Period by receiving permission from a court with competent jurisdiction.

6. After all payments are made to the stock company’s creditors, liquidators must distribute any remaining surplus to the stock company’s shareholders. Each shareholder will receive a distribution which is proportional to the number of shares owned.

7. Liquidators must prepare a final account statement for the stock company and have such statement approved at the shareholders’ meeting. If shareholders approve the final account statement, liquidators are deemed to be released from any liabilities owed to the stock company for failure to perform their duties during the liquidation proceedings. However, liquidators are not released from any liabilities arising from any misconduct during the performance of their duties.

8. Within two weeks from the date of the shareholders’ meeting, liquidators must register the completion of liquidation proceedings with the Bureau. Upon such registration, the stock company loses its corporate status (with exceptions provided for in the Companies Act).

9. After liquidation proceedings are completed, the sole liquidator, a representative liquidator, or one of the liquidators appointed by the Board of Liquidators, will become the designate person who maintains account books and important documents concerning the stock company’s business operation and liquidation. Such person will have this responsibility for ten years after liquidators register the completion of liquidation proceedings with the Bureau.

Please refer to the chart below in order to better understand the order by which a stock company is dissolved and liquidated. As explained above, it is not technically difficult to dissolve and liquidate a Japanese stock company. However, it takes several months before dissolution and liquidation procedures are completed. Accordingly, if a foreign corporate client is considering a dissolution and liquidation of its Japanese subsidiary, it is important to take into account the necessary timeframe to complete the procedures.

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i In cases where a higher proportion is provided for in its Articles of Incorporation, then such proportion.

ii In cases where a proportion of one-third or more is provided for in its Articles of Incorporation, such proportion or greater.

iii In addition, the name(s) and address(es) of representative liquidator(s) must also be registered if such representative liquidator(s) have been appointed.

iv These are procedures for the “normal” liquidation of a stock company. In contrast, liquidators or other interested parties can file a petition, requesting the competent court to order to commence the procedures for a “special liquidation” of the company if there is suspicion that (i) circumstances exist which are prejudicial to implement the liquidation or (ii) the stock company is insolvent. “Special liquidation” procedures are similar to bankruptcy procedures.
STANDARD TIMETABLE FOR DISSOLUTION AND LIQUIDATION

I. Dissolution
1. Board of Directors’ Decision
   Resolution to convene a shareholders’ meeting
2. Shareholders’ Meeting
   (1) Resolution to dissolve
   (2) Appointment of the liquidator(s) (within two weeks)
3. Registration of Dissolution (within two weeks)
4. Report Dissolution to Tax Office

II. Liquidation
1. Registration of Liquidator(s)
   (1) Name(s) of the liquidator(s)
   (2) Name(s) and address(es) of the representative liquidator(s)
   (3) Formation of Board of Liquidators (if any)
2. Preparation of List of Property and Balance Sheet
3. Liquidator(s)’ Decision
   Resolution to convene a shareholders’ meeting
4. Shareholders’ Meeting
   Approval of the List of Property and Balance Sheet
5. Dispose of Pending Matters (if any)
6. Collect Debts (if any)
7. Submit report relating to the approval of the List of Property and Balance Sheet to the tax office (within two months from the dissolution date)
8. Payments to Creditors
   (1) Notice
      (a) Submit notice to each creditor known to the company
      (b) Public notice by official gazette (within two delay)
   (at least two months)
   (2) Pay off obligations
9. Dispose of Remaining Assets
   (1) Convert assets
   (2) Submit Final Tax Return to the Tax Office
   (3) Distribute proceeds to shareholders
10. Final Account Statement
    (1) Prepare final account statement for the stock company
    (2) Liquidator(s)’ Decision
        Resolution to convene a shareholders’ meeting
    (3) Shareholders’ meeting
        Approval of the final account statement (within two weeks)
11. Register the Completion of Liquidation
12. Retention of Books and Important Documents for ten years after Registering the Completion of Liquidation

Our Cross-Border Transactions Group was organized to specifically address the challenges associated with matters impacting multiple borders, and provides clients with a broad range of services at an unparalleled quality level. The CBT Group is fully immersed in every aspect of N&A’s practice, and is capable of providing one-stop shop seamless representation for clients contemplating a cross-border venture or faced with an international issue relating to Japan. The CBT Group consists of Japanese and non-Japanese law qualified attorneys, all possessing significant cross-border transactional experience. The depth of our group allows us to swiftly mobilize resources to respond to time-sensitive matters, regardless of the complexity of the transaction.

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DECREE ENACTING THE FEDERAL LAW FOR PROTECTION OF PERSONAL DATA IN POSSESSION OF A PERSON, AND AMENDING PARAGRAPHS II AND VII OF ARTICLE 3, AND ARTICLE 33, AS WELL AS THE HEADING OF CHAPTER II, OF THE SECOND TITLE, OF THE FEDERAL LAW OF TRANSPARENCY AND ACCESS TO PUBLIC GOVERNMENTAL INFORMATION.

The Decree enacting the Federal Law for Protection of Personal Data in Possession of a Person (Ley Federal de Protección de Datos Personales en Posesión de Particulares – the “Law”), and amending paragraphs II and VII of Article 3, and Article 33, as well as the heading of Chapter II, of the Second Title of the Federal Law of Transparency and Access to Public Governmental Information, is expected to be published soon in the Official Gazette of the Federation. The Law will become effective the day following its publication in the Official Gazette of the Federation and will oblige the Mexican President to issue the Regulations on the Law within a term of one year following the effective date of the same.

The Law finds its origin in the amendments to Article 16 and paragraph XXIX-O of Article 73 of the Political Constitution of the United Mexican States, published in the Official Gazette of the Federation on April 30 and June 1, 2009, in which Mexican Congress was expressly authorized to legislate on the subject of personal data protection and acknowledged the right of any individual for the protection of his/her personal data and the exercise of those rights inherent to such protection, which are now contemplated by the Law.

Following please find a general description of the most relevant aspects of the Law and the decree in general.

General Provisions

The Law is of general compliance throughout the Mexican Republic and binds every private person, whether an individual or entity, that obtains, uses, discloses or stores personal data. The Law intends to warrant privacy and the right of self-determination over personal data. Notwithstanding the above, the following are exempted from complying with the Law, (i) credit bureaus, and (ii) any person collecting and storing data of this kind for personal use and without the purpose of divulging or commercializing it.

For purposes of this Legal Update, following please find certain important definitions contained in the Law:

(a) **Privacy Policy**: Any document, in physical, electronic or any other format, created by the Controller (as defined below), which is made available to the Data Subject prior to processing his/her Personal Data (as defined below). The Privacy Policy shall comply with certain requirements set forth by the Law.

(b) **Database**: Collection of organized Personal Data relating to an identified or identifiable person.

(c) **Consent**: The expression of the wishes of the Data Subject to process Personal Data.

(d) **Personal Data**: Any information related to an identified or identifiable individual.

(e) **Sensitive Personal Data**: Personal Data affecting the most intimate sphere of the Data Subject or that in which its misuse may be a cause for discrimination or great risk for the Data Subject.
Particularly, Sensitive Personal Data shall be deemed that related to racial or ethnic origin, current or future health condition, genetic information, religious, philosophical or moral beliefs, labor union affiliation, political opinions, or sexual preferences.

(f) **Public Access Sources**: A Database that may be accessed by anyone without complying with any requirement, except for a fee, if applicable, complying with Regulation of the Law.

(g) **Institute**: The Federal Institute for Information Access and Data Protection, referred to in the Federal Law of Transparency and Access to Public Governmental Information.

(h) **Controller**: Any private person, whether an individual or entity, that decides over the processing of Personal Data.

(i) **Third Party**: Any individual or entity, whether national or foreign, different from the Data Subject or from the Controller.

(j) **Data Subject**: The natural person to whom the Personal Data concerns.

(k) **Processing**: The collection, use, disclosure or storage of Personal Data by any means. The use of the data includes the action of accessing, handling, benefiting from, Transferring (as defined below), or disposing of Personal Data.

(l) **Transfer**: Any kind of communication of Personal Data made to a person different than the Controller or the responsible of Processing it.

### Personal Data Protection Principles

The Law sets forth certain guiding principles based on international standards that aim to warrant Personal Data protection, which are briefly described as follows:

- **Legality Principle**. All Personal Data shall be lawfully collected and processed and, its collection shall not be made through fraudulent or deceitful means. Likewise, the reasonable expectation of privacy with respect to Processing of Personal Data shall be presumed; which means that those exchanging Personal Data are relying that Personal Data being exchanged between them shall be treated as agreed between them in compliance with the Law.

- **Consent Principle**. All Processing of Personal Data shall be subject to the Consent (whether express or implied) of the Data Subject, save for those exceptions set forth by the Law. With respect to Sensitive Personal Data, the Controller shall obtain express and written consent of the Data Subject to process this data, consent that can be evidenced with handwritten signature, electronic signature, or any other authentic mechanism created for such purpose.

  Consent from a Data Subject shall not be required to process Personal Data when: (i) such is permitted by Law; (ii) such appears on Public Access Sources; (iii) does not permit to be associated with the Data Subject or, due to its structure, content or grade of disaggregation, does not allow identifying the Data Subject; (iv) Processing is intended to comply with obligations deriving from a legal relationship between the Controller and the Data Subject; (v) there is an emergency situation that may place at risk an individual and his/her goods; (vi) such is essential for certain medical or health matters in accordance with certain requirements set forth in greater detail by the Law; and (vii) the competent authority resolves to process it.

- **Quality Principle**. The Controller shall cause the Personal Data in the Database to be relevant, accurate, and up-to-date for the purpose for which such is meant to be used. Once the Personal Data is no longer needed for the purpose for which it was collected, it shall be cancelled.

- **Purpose Principle**. Processing of Personal Data shall be limited to fulfill the purpose set forth in the Privacy Policy. No Database containing Sensitive Personal Data shall be created without justifying
that the purpose for its collection is legitimate, concrete, and in compliance with those activities and purpose explicitly sought by the Controller.

If the Controller intends to use Personal Data for a different purpose that is not is not compatible or analogous to what is set forth in the Privacy Policy, a new Consent from the Data Subject shall be required.

- **Proportionality Principle.** Processing of Personal Data must be necessary, adequate, and relevant for the purpose set forth in the Privacy Policy. With respect to the Sensitive Personal Data, the Controller shall make a reasonable effort to limit to a minimum the period for Processing the data.

- **Loyalty Principle.** The Controller shall be responsible for compliance with security safeguard principles, adopting the necessary measures for its implementation. This matter shall also apply when data is processed by a Third Party as per Controller’s request. Controller shall adopt those measures required and sufficient to secure full compliance of the Privacy Policy known by the Data Subject by the Controller and third parties with whom it has a legal relationship.

- **Transparency Principle.** The Controller shall have the obligation to report to the Data Subject, by means of a Privacy Policy, the information that is being collected and the purpose for such collection. With respect to Sensitive Personal Data, the Privacy Policy shall expressly state that the information is of sensitive nature.

- **Responsibility Principle.** Any Controller processing Personal Data shall take and keep appropriate security safeguard, administrative, technical, and physical measures to protect Personal Data against damages, loss, modifications, destruction or unauthorized access or Processing. The Controller shall not adopt lower security safeguards measures than those that it uses for Processing its own information. Likewise, it will be taken into account the actual risk, the possible consequences for the Data Subjects, the sensitivity of the data, and technological development.

Controllers shall designate a person or create a Personal Data department and shall issue its Privacy Policy in favor of the Data Subject, within a period of one year following the enactment of the Law.

**Data Subject’s Rights**

A Data Subject shall exercise, in accordance with the Law, their rights of access, rectification, cancellation, and opposition, which consist of:

- **Access Right.** A Data Subject is entitled to access his/her Personal Data held by a Controller, as well as to know the Privacy Policy to which the Processing is subject to.

- **Rectification Right.** A Data Subject is entitled to rectify his/her Personal Data when it is inaccurate or incomplete.

- **Cancellation Right.** A Data Subject shall always be entitled to cancel his/her Personal Data. The cancellation of Personal Data implies that such information shall be kept by the Controller for as long as the legal or contractual prescription requires, with the only purpose to determine possible responsibilities with respect to its processing. Once the foregoing period of time has occurred, the Controller shall proceed to suppress the corresponding Data Bases.

- **Opposition Right.** A Data Subject shall always be entitled, with legal cause, to oppose to the Processing of his/her data. In case the foregoing applies, the Controller shall not be entitled to Process the data concerning the Data Subject.

**Enforcement of Access, Rectification, Cancellation, and Opposition Rights**
The Data Subject or its legal representative may request at any time to the Controller access to his/her Personal Data, or the rectification, cancellation or opposition to such, in the understanding that such request must comply with the requirements provided by Law.

Every Controller shall designate a person or create a department in charge of processing those requests from Data Subjects, so that he/she can exercise those rights granted by Law. Likewise, the Controller shall promote within its organization the protection of Personal Data.

The Controller shall have twenty days, commencing on the date in which the request for access, rectification, cancellation, or opposition has been received, to inform its resolution to the Data Subject and, such request is applicable, such access, rectification, cancellation or opposition is carried out within fifteen days from the date the Data Subject is informed of the resolution. In the event the request is to access Personal Data, the delivery of the information shall be made once the identity of the Data Subject or legal representative has been evidenced. If there are circumstances justifying it, the aforementioned periods may be extended once for an equal period of time.

Delivery of Personal Data will be at no cost and, therefore, the Data Subject should only pay the justified shipping costs plus the cost of reproducing copies or other formats.

The Data Subject may exercise against Controllers his/her rights to access, rectification, cancellation and opposition, as well as to commence, if applicable, the proceeding for protection of rights, until the eighteenth month following enactment of the Law.

**Data Transfer**

When the Controller intends to transfer Personal Data to a Third Party, whether national or foreign, other than the person in charge of the Personal Data, the Controller must inform to them the terms of the Privacy Policy and the purpose for the Processing of Personal Data.

Processing of Personal Data shall be made as agreed in the Privacy Policy, which shall contain a clause stating whether or not the Data Subject agrees to transfer his/her data; therefore, the Third Party receiving the Personal Data shall assume the same obligations incumbent to the Controller who transferred the data.

National or international data Transfers may be carried out without the Consent upon the occurrence of any of those events provided by Law including, among others, a Transfer stipulated by a law or Treaty to which Mexico is party, a Transfer needed for prevention or medical diagnosis, health care assistance, medical treatment or management of health services, a Transfer to holding companies, subsidiaries or affiliates under the common control of the Controller, or a parent company or any associated company of the Controller who operates under the same processes and internal policies, and a Transfer required by an agreement, or an agreement to be executed in the interest of the Data Subject between the Controller and a Third Party, among others.

**Authorities**

The Institute shall be in charge of promoting the rights to protect Personal Data throughout Mexico, to promote its enforcement and to supervise due compliance of the provisions set forth by the Law and those laws deriving therefrom; particularly those regarding compliance with obligations of the Controllers. On the other hand, the Law has granted the Institute certain authorities including, among others: (i) to overview and verify compliance with the Law; (ii) to interpret the Law in administrative aspects; and (iii) to resolve those claims to enforce rights provided by the Law, and to impose the corresponding penalties, among others.

The Secretariat of Economy shall be in charge of divulging knowledge of the obligations on Personal Data among national or foreign private business established in Mexico; promoting the best business practices on Personal Data protection as an asset for the digital economy, and developing the national economy as
a whole. The Secretariat of Economy is also entitled to issue guidelines on the content and scope of the Privacy Policies in collaboration with the Institute.

Protection of Rights Proceeding

The proceeding that the Data Subject may commence under the Law consists in a general sense on the following:

- The proceeding will commence upon a claim submitted by the Data Subject, or his/her legal representative, clearly stating the merits of the claim and those provisions being infringed, in the understanding that claim for data protection shall be filed before the Institute, either (i) within a period of fifteen days following the date in which the Controller informed its resolutions to the Data Subject; or (ii) upon the expiration date for the Controller to render its resolution; (iii) when the Controller does not provide to the Data Subject the information required; or (iv) when the Controller provides to the Data Subject the information required in an illegible format; or (v) when the Data Subject is unsatisfied because he/she considers the information to be incomplete or inconsistent with the request of the Data Subject.

- The Institute shall admit the applicable evidence and will continue with analyzing it. Likewise, the Institute may request to the Data Subject any other evidence deemed convenient.

- The regulation of the Law shall set forth the manner, the conditions and terms under which the proceeding for Personal Data protection will be carry out.

- The Institute shall correct the deficiencies of the claim when needed, only and if the original content of the request of access, rectification, cancellation, or opposition of Personal Data, or the facts or petitions established therein or the data protection request are altered.

Verification Proceeding

The Institute has the authority to verify compliance with the Law and of the legislation deriving from it. The verification process may begin ex-officio or upon request of a party.

The ex-officio verification will take place upon a breach of a resolutions issued in connection with a data protection proceeding, or upon a breach of the Law is presumed to be founded and substantiated. During the verification proceeding, the Institute shall have access to the information and documentation deemed necessary, in accordance with the resolution originating the verification.

Fine Imposition Proceeding

In the event that the Institute becomes aware, during the proceeding for data protection, of a presumed breach of any of the principles or provisions of the Law, a proceeding to impose fines will commence in order to determine those corresponding to the infringement.

Fines and Infringements

The actions carried out by the Controller in breach of the Law, shall be punished by the Institute. Those fines will depend upon the actions carried out by the Controller and may consist on a fine between 100 to 320,000 times the minimum wage in force in the Federal District.

If the Controller continues with its infringement, an additional fine of up to 100 to 320,000 times the minimum wage in force in the Federal District will be imposed. If the infringements are related to the Processing of Sensitive Personal Data, those fines may be increased to twice the amount.
Crimes Related to Unlawful Processing of Personal Data

A person authorized to Process Personal Data that, with the purpose of obtaining a gain, causes a breach of security in the Database under his/her control, shall be punished with three months to one year imprisonment.

A person that, with the purpose of obtaining a gain, Processes Personal Data through deceitful actions, taking advantage of the error of the Data Subject, or the person authorized to transfer it, shall be punished with six months to five years imprisonment.

In the case of Sensitive Personal Data, all penalties are double.

For further information on the subject please contact Mr. Jorge León Orantes, jleon@s-s.mx, Mr. César G. Cruz, ccruz@s-s.mx, or Ms. Paola Morales, pmorales@s-s.mx. Phone numbers: (+52 55) 52 79 54 00 or (+52 81) 81 33 60 00.
The Dutch legislation requiring energy companies to unbundle their energy network companies violates European law. This was the decision reached on 22 June 2010 by the Court of Appeal of The Hague in a case brought by three large energy suppliers (Essent, Delta and Eneco) against the Dutch State.

Essent, Delta and Eneco are integrated energy companies. They produce energy (gas and electricity) and supply this energy over their gas and electricity networks to consumers. These networks are managed by a separate company within each group, the network manager.

The Unbundling Act (Wet onafhankelijk netbeheer), passed in 2006, amended the Dutch Electricity Act and Gas Act to require integrated energy companies in the Netherlands to unbundle their network management companies from the rest of the group. Under the amendments, network managers and energy companies operating in the Netherlands are no longer allowed to form part of the same group (the "group ban"). In addition, neither is allowed to own shares in the other. The unbundling must be completed prior to 1 January 2011. In view of this deadline, Essent has already completed the unbundling process. The Dutch State’s main justification for the unbundling is that energy companies that are also network managers otherwise have an unfair advantage over competitors that do not manage networks. The State is also concerned that energy companies could pass on the costs of their commercial activities to consumers who purchase energy. Ultimately the network quality could suffer or disruptions in energy supply could occur.

The court of appeal ruled in favour of Essent, Delta and Eneco, holding that the Unbundling Act infringes the EU provisions on the free movement of capital. This means it is incompatible with EU law unless the restriction can be justified by overriding reasons in the general interest. The court of appeal considered at length the reasons put forward by the State to justify the unbundling but concluded that they do not constitute overriding reasons in the general interest. In part, the State’s concerns have already been removed by existing regulation. This applies, for example, to the need to safeguard network quality and an uninterrupted energy supply to consumers. Some of the reasons given by the State are purely economic in nature, such as the relationship between competitors on the energy market. According to the European Court of Justice, economic interests cannot justify an infringement of the free movement of capital.

Our comments:

1. The Dutch energy market has long been dominated by four vertically integrated energy companies: Essent, Nuon, Eneco and Delta. The Unbundling Act has always been controversial, as it went far beyond what was prescribed by the EU electricity and gas directives.
2. Essent and Nuon proactively unbundled in 2009 in the context of the sale of their commercial businesses to RWE and Vattenfall, respectively. The unbundling was necessary to effect these sales in light of the network privatisation ban. In retrospect, based on this judgment, the unbundling would not have been necessary.
3. Conversely, Eneco and Delta have not yet unbundled their network business from their commercial business. The judgment takes effect immediately, notwithstanding the State's decision to challenge the judgment before the Supreme Court. Consequently, Eneco and Delta are not required to unbundle prior to 1 January 2011.

4. The court of appeal has not rendered judgment on the validity of the privatisation ban for "technical" reasons. The judgment, however, suggests that the current privatisation ban may be incompatible with EU law and therefore also unenforceable.

5. This afternoon, members of parliament expressed concern about the implications of the judgment and urged the government to take measures to prevent the acquisition of networks by private parties. Given the current status of the outgoing government and the complex government-formation process following the outcome of the June elections, we believe it is unlikely that repair measures can be taken on short notice. This creates a window of opportunity for investors.

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The government this week announced proposals for a complete overhaul of New Zealand's securities laws.

A 200 page discussion paper has been released, containing detailed proposals in key areas, including:

- **scope**: the types of products regulated;
- **exemptions**: the types of offers exempted;
- **disclosure**: mandated disclosure requirements for different products; and
- **collective investment schemes**: specific proposals for managed funds.

New Zealand's existing securities regime has been in place for over 30 years, and only ad hoc updates have taken place over that time. The time is ripe for a major review, and we welcome this full reconsideration of the regulatory framework.

The discussion document sets out the over-arching principles that should govern law reform in this area:

- investors should be responsible for their decisions, and the law should allow them to be so, rather than remove investment risk;
- appropriate investment transactions should be regulated, and the law should be clear when and how particular transactions are regulated;
- innovation should not be stifled, but the law should ensure there is capacity for new products to be properly regulated;
- similar investments should be treated in the same way;
- disclosures need to be meaningful and useful, and standardised where possible for comparability;
- managed funds (collective investment schemes) need to function with the interests of investors put first, and ideally aligned with international best practice; and
- sanctions must be well understood, in proportion to offences, and imposed on appropriate parties.

These principles make good sense.

There is no quick fix in this area, and a full review will take time. It will be worth New Zealand's while to ensure there is a focus on getting the balance right, and making sure these principles are kept to the forefront.
Our (Banking) Secrets Are Safe For Now

As Singapore strives to be a leading financial centre in the region, banking secrecy laws have become increasingly important. Banking secrecy is what guarantees clients of banks that their information will be kept confidential and will not be passed on to private individuals or official bodies. In Singapore, this comes in the form of section 47 of the Banking Act (“the Act”) which places banks under statutory obligations of secrecy in respect of customer account information. This obligation of confidentiality extends to officers in a bank, defined in section 2(1) of the Act to include a director, secretary, employee, receiver, manager and liquidator. Banks are allowed to disclose information about customers and their accounts only under narrowly described circumstances.

Banking secrecy was recently examined in the Court of Appeal case of Susilawati v American Express Bank Ltd [2009] 2 SLR(R) 737 (“Susilawati”).

In Susilawati, the appellant was a customer of the respondent bank and executed a charge over all monies in her account to secure her son-in-law’s liabilities to the bank. Monies were eventually deducted from the account as a result of her son-in-law’s inability to discharge his liabilities. The appellant had her claims of undue influence and breach of fiduciary duty dismissed at the court of first instance and appealed, applying for the court to order a new trial raised by the appellant in the appeal, for leave to adduce further evidence and for leave to amend the pleadings.

The trial judge discussed the English Court of Appeal case of Tournier v National Provincial and Union Bank of England [1924] 1 KB 451 (“Tournier”) which held that a banker was generally under an implied duty to keep the affairs of his customer confidential. This, however, was subject to four general exceptions. A bank could make a disclosure where: (a) the bank was compelled to do so by law, (b) it was in the public interest to disclose, (c) it was in the interests of the bank to disclose, or (d) the disclosure was made by the express or implied consent of the customer. In particular, the judge focused on the fourth common law exception mentioned in Tournier which allowed disclosure if a customer gave express or implied consent.

The Court of Appeal comments however were of much wider general application. While not expressly raised in the appeal, the Court felt it important to correct any impression that may have been given by the lower court that there was room for common law exceptions to a banker’s duty to keep the affairs of a customer confidential.

In fact, the Court felt “compelled to address this issue to ensure that the position is free from doubt” by stating that “In light of the plain wording of section 47, our current statutory regime on banking secrecy leaves no room for the four general common law exceptions...”
expounded in Tournier to coexist. They have been embraced within the framework of section 47 of the Banking Act, which is now the exclusive regime governing banking secrecy in Singapore. Section 47 makes it plain that no customer information shall be disclosed by a bank in Singapore or any of its officers except as expressly provided for in the Banking Act. A breach of any of the prescribed statutory obligations amounts to a criminal offence. The Third Schedule to the Banking Act sets out, in illuminating detail, the circumstances, conditions, and details of permissible disclosure. It is axiomatic that, in terms of details and scope, this is a more comprehensive regime than that articulated in Tournier. There is simply no room, in Singapore, for the less sophisticated and more general common law rules articulated in Tournier to have any further relevance save for the perspective of historical evolution and context it provides.”

It is interesting to note that the Court of Appeal, including Chief Justice Chan Sek Keong, did not stop at the strict reading of section 47 but went on to clarify that it did not currently see any problems with our current statutory banking regime in relation to the particular issues identified by the trial judge. The trial judge had hoped that “in time to come, there would be amendments to the [Banking] Act or new legislation altogether to strike an appropriate and fair balance between the interests of confidentiality for banks and the protection of guarantors of banks’ customers.”

The Court of Appeal said, “There is, with respect, no peculiar lacuna in the law which presently necessitates the immediate attention of and intervention by the legislature.”

Such an unequivocal endorsement of our current strict banking secrecy laws by the highest court is interesting to note when considered against the background of commentary and renewed criticism of the banking secrecy laws in Switzerland.

Switzerland, still for many a bastion of banking secrecy, has in the last year faced renewed pressure from the US, among others, to open its potential Pandora’s box and expose errant tax evaders. Despite Switzerland announcing last year that they would give limited cooperation in international tax probes, the pressure continues to pile on this year from other countries such as Germany. This may be due to the international economic crisis with many Western powers scrambling to regain funds from tax evaders to finance their recovery packages.

While Singapore has been successful in positioning itself as a financial centre, particularly in Asia, and naturally a few comparisons have been made internationally between Switzerland’s and our banking regimes, Switzerland with its much longer tradition as a tax haven still remains firmly the focus of governments.

As Switzerland continues to dig its heels in and in light of the expressed confidence of our Court of Appeal in our Banking Act, it appears that for the time being, our banking secrets will remain safe.

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1 The March 2009 edition of the Rodyk Reporter published an article on the High Court decision of the Susilawati case called “Duty Of Confidentiality Versus Interests Of Third Party Security Providers.”
RULES ON TAXATION OF STRUCTURED FINANCIAL PRODUCT TRANSACTIONS DENOMINATED IN FOREIGN CURRENCIES

Josephine Peng/Ko-Jen Hsiang

In response to the amendment to Article 14-1 of the Income Tax Act and the enforcement rules on taxation of structured financial product transactions, the Ministry of Finance announced on 4 January 2010 (Ref. No.: Tai-Tsai-Shui-09804135600) that the profit and loss from trading structured financial products denominated in foreign currencies should be handled separately from the foreign exchange profit and loss from the changes in the currency value of the investment capital used to trade such financial products in order to reasonably reflect the actual profit and loss and facilitate the statutory tax withholder's handling.

• Trading of structured financial products

For any trade that is closed after 1 January 2010, individuals and profit-seeking enterprises who trade structured products denominated in foreign currencies with banks should calculate the profit and loss of such trade in the transaction currency on the closing date. The tax withholder should convert the profit and loss so calculated into New Taiwan Dollars based on the exchange rate adopted by the banks they trade with on the closing date and withhold income tax in accordance with the law.

The income that individuals have generated from trading structured financial products with securities firms or banks will be taxed separately, and the tax will be withheld at source. The tax rates are 10% and 15% respectively for individuals residing in Taiwan and those not residing in Taiwan.

If a profit-seeking enterprise with a fixed place of business in Taiwan trades structured financial products, 10% of the income that it has generated from such trade should be withheld. Unlike an individual, the profit-seeking enterprise should declare such income in its annual tax return and pay tax thereon accordingly. However, the relevant costs and expenses are tax deductible, and the tax withheld can be deducted from its tax payable. For a profit-seeking enterprise that has no fixed place of business in Taiwan, 15% of the income that it has generated from trading structured financial products should be withheld at source.

• Foreign Exchange
Foreign exchange profit and loss from the changes in the currency value of the investment capital used to trade structured financial products should be considered capital gains and loss and should be calculated when the foreign currency is converted into New Taiwan dollars. All individuals and profit-seeking enterprises should declare such gains and loss in their tax returns.
Federal Circuit Addresses Who Owes A Duty Of Candor To The PTO

Tom Hitchcock

In a recent decision, the United States Court of Appeals for the Federal Circuit considered the issue of which individuals are “substantially involved” in the preparation or prosecution of a patent application and thus owe a duty of candor and good faith to the Patent and Trademark Office (“PTO” or “The Office”) under 37 C.F.R. § 1.56. See Avid Identification Systems, Inc. v. Crystal Import Corp., ___ F.3d ___, 2010 WL 1659143 (Fed. Cir. Apr. 27, 2010). In a 2-1 panel decision, the Federal Circuit affirmed the district court's judgment that U.S. Patent No. 5,235,326 (the “'326 Patent”) was unenforceable due to inequitable conduct. The importance of this decision is that it provides guidance on how 37 C.F.R. § 1.56(c) is applied to persons who are not named inventors or attorneys or agents associated with the filing of a patent, an issue that has never before been explicitly addressed by the Federal Circuit.

A. Applicable Principles

37 C.F.R. § 1.56(a) states that:

Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the Office, which includes a duty to disclose to the Office all information known to that individual to be material to patentability as defined in this section.

37 C.F.R. § 1.56(c) clarifies what the phrase “individual associated with the filing and the prosecution of a patent application” means by defining that term to cover:

(1) Each inventor named in the application;

(2) Each attorney or agent who prepares or prosecutes the application; and

(3) Every other person who is substantively involved in the preparation or prosecution of the application and who is associated with the inventor, with the assignee or with anyone to whom there is an obligation to assign the application.

B. Procedural Posture And Background

Avid Identification Systems Inc. (“Avid”) brought suit against Datamar's SA and its subsidiary Crystal Import Corporation (collectively “Datamar's”) in the Eastern District of Texas alleging infringement of the '326 Patent. The claims of the '326 Patent are directed to a multi-mode radio-frequency identification system for reading encoded biocompatible chips, a concept that Dr. Hannis Stoddard, Avid’s founder and president, had hired at least three engineers to develop. The '326 Patent was found valid and infringed by the district court.

Following the trial, the district court granted a motion filed by Datamar's finding that the '326 Patent was unenforceable due to inequitable conduct. Specifically, the district court determined that Dr. Stoddard failed to comply with his duty of candor and good faith by not disclosing his trade show demonstration in April of 1990 to the PTO (such a demonstration being potentially relevant as a prior art event, i.e., a public use). After the ruling, Avid and Datamar's entered into a settlement agreement, and pursuant to the terms of that agreement, Avid filed an unopposed motion for reconsideration solely directed to the district court's inequitable conduct decision. The district court dismissed the unopposed motion. Avid then appealed the district court's determination of inequitable conduct to the Federal Circuit.

C. The Federal Circuit Opinion

The Federal Circuit reviewed the district court’s conclusion that Dr. Stoddard’s role and actions within the company were those of an “individual associated with” the patent and thus subject to Rule 56’s duty of disclosure and candor. Specifically, the
appeals court reviewed whether Dr. Stoddard was (1) "substantively involved" in the preparation or prosecution of the '326 Patent and (2) associated with the inventors of the '326 Patent and with its assignee, thus owing a duty of candor to the PTO.

With respect to the first requirement of 37 C.F.R. § 1.56(c)(3), the district court had determined that Dr. Stoddard was "involved in all aspects of the company's operation from marketing and sales to research and development." The Federal Circuit agreed that Dr. Stoddard's involvement in "all aspects," including research and development, contributed to a reasonable inference that he was also involved in the preparation of the patent application relating to that research. The Federal Circuit stated that this inference was especially reasonable because the '326 Patent was directed to the system that fulfilled Dr. Stoddard's personal mission and the purpose for which his company was created.

The district court also determined that the existence of certain documents contributed to an inference that Dr. Stoddard was substantively involved in patent matters relating to the '326 Patent. One of these documents was a communication from an inventor named in the '326 Patent sent only to Dr. Stoddard and a European prosecuting attorney regarding contents for a European patent application directed to the same subject matter of the '326 Patent. The other communication was a note from the same inventor to Dr. Stoddard advising him to check with Avid's European patent attorney before demonstrating any of Avid's technology. The Federal Circuit suggested that these facts alone demonstrated substantive involvement. Because the European patent application and the '326 Patent dealt with the same subject matter and preparations for both applications were underway at roughly the same time, the Federal Circuit states that an inference that Dr. Stoddard was similarly involved in the '326 Patent was reasonable and not clearly erroneous.

With respect to the second requirement of 37 C.F.R. § 1.56(c)(3), the district court determined that Dr. Stoddard was associated with the inventors and with the assignee because: (1) he was the president and founder of Avid, (2) Avid is a closely held company and (3) Dr. Stoddard hired the inventors to reduce his encrypted chip concept to practice. The Federal Circuit found that these facts establish that Dr. Stoddard was associated with the inventors of the '326 Patent and with the assignee, Avid.

Thus, the Federal Circuit panel majority concluded that the district court's duty of candor analysis was not clearly erroneous, but rather that this analysis was reinforced by their own review of the entire record and relevant case law.

D. The Dissent

In a dissenting opinion, Circuit Judge Linn disagreed with the panel majority that Dr. Stoddard was substantively involved in the preparation or prosecution of the '326 Patent application. He argues that it should be self-evident that when 37 C.F.R. § 1.56(c)(3) refers to persons who are substantively involved, it is referring to those persons who are both: (1) engaged in the preparation or prosecution of an application and (2) sufficiently apprised of the technical details or legal merits of the application so as to be able to assess the materiality of any information they may know or discover as the application is prepared or prosecuted.

The majority opinion addressed these dissenting arguments by noting that 37 C.F.R. § 1.56(c)(3) does not require the individual to be able to assess the materiality of any information he may know or discover in order to be associated with the patent or application. Rather, what a person knew or should have known only matters after he is found to be associated with the filing and prosecution of a patent application. Indeed, the majority made the point that the involvement and knowledge inquiries are completely distinct ones under a plain-language reading of 37 C.F.R. § 1.56, being located under separate subsections (subsections (c) and (a), respectively). Thus, the majority argued, there is no knowledge of materiality requirement under 37 C.F.R. § 1.56(c) in order to establish "substantial involvement."

The analysis of allegations of failure to meet the duty of candor (and specifically, the "substantial involvement" qualification for who is subject to this duty) will continue to be fact-specific and resist any bright line rules. This recent decision by the Federal Circuit serves, though, along with other recent cases analyzing what must be disclosed to the patent office, as a reminder that applicants should work closely with prosecution counsel to determine just how wide a net they are obligated to cast in evaluating prior art and other information that should be disclosed to relevant patent offices before whom their applications are pending.

Baker Botts will continue to monitor this important area of the law, and will provide future reports as that law continues to develop. Please feel free to contact us with any questions you may have on this topic.
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Early Coverage of Adult Children: Compliance Traps for Employers

06.30.10

By Jeff Belfiglio and Stuart Harris

Health Care Reform legislation will require coverage of children of plan participants up to age 26, effective for the first plan year beginning after September 23, 2010. The Obama Administration has encouraged insurers and self-insured plans to extend coverage earlier than required, and many insurers have announced that they are doing so during 2010. We have found that there is widespread confusion on the differences between this “early coverage” of adult children and the mandatory coverage that will take effect later. Employers need to be aware that even if their insurer or self-insured plan administrator has extended coverage for adult children in 2010, there are still important requirements that will need to be met when mandatory coverage takes effect.

We have reviewed several insurance company announcements of their early coverage policies. All of them extend coverage to age 26 only for dependents already on the plan, who would have “aged off” the plan in 2010 absent a change. (One insurer we reviewed only extended coverage for children who would lose it due to college graduation.) In Washington, insured plans already had to cover children to age 25; in other plans children might become ineligible when they cease to be a dependent, at age 23 or at 19 if not enrolled in college. Pursuant to the “early coverage” changes adopted by many insurance companies, children who hit the applicable age for termination of coverage under the plan during the remainder of 2010 could remain on the plan, and thus would not have to use COBRA to keep their coverage. Most insurers are offering early coverage on an “opt-out” basis; that is, coverage will be extended as announced unless the employer notifies the insurer that it does not want the extension for its plan.

This early coverage of adult children differs from the mandatory coverage that will take effect in 2011 for most plans. The IRS, Department of Labor and HHS issued interim final regulations concerning coverage of adult children on May 13, 2010. The regulations require coverage of adult children up to age 26, regardless of whether the child is married, a student, a dependent, or residing at home. There is a limited exception is for grandfathered plans, which until 2014 can deny coverage to an adult child who is eligible for coverage under another employer’s plan, through the child’s or child’s spouse’s employment. The mandatory coverage is thus broader than the early coverage that at least some insurers are offering. More important, the regulations require an open enrollment period for adult children, including those not on the plan who will now be eligible to enroll or re-enroll. This could include children who aged off in prior years, children on COBRA continuation coverage, and children who were never on the plan because they were too old when the parent became eligible. All adult children must receive notice of an open enrollment period of at least 30 days; the notice can be given to the employed parent. Coverage must be effective at the beginning of the effective plan year, retroactively if necessary. (As with HIPAA special enrollment, a parent who dropped coverage when his or her child became ineligible can re-enroll on the plan at the same time as the adult child if necessary for the child to be covered.) Most employers will want to integrate this open enrollment requirement with their normal open enrollment period occurring prior to the plan year beginning after September 23, 2010.

Early coverage of adult children will make sense for many employers. For example, a Washington employer with an insured plan may not want to exclude a child who turns age 25 later in 2010, or force the child onto COBRA, if the child will be eligible to re-enroll January 1, 2011. Such a plan would accept the insurer’s offer to extend coverage early. (A self-insured plan sponsor may feel differently about taking on additional risks before required.)

But employers must be clear about the fact that accepting early coverage does not fulfill the mandatory coverage requirements. None of the insurers we have reviewed are offering open enrollment in 2010.
**Action Needed:** Even if a plan’s insurer or administrator has extended coverage to adult children on the plan in 2010, the employer will still need to conduct open enrollment for children not currently on the plan (and may need to expand the coverage offered earlier) effective for the next plan year. Employers should thus be prepared to include the notice of open enrollment for adult children in their next enrollment period materials and to get the notice to all employees.

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Supreme Court Limits Application of Section 10(b) and Rule 10b-5 of Exchange Act to Domestic Transactions

On June 24, the U.S. Supreme Court held in *Morrison v. National Australia Bank Ltd.* that the principal antifraud provisions of the federal securities laws, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, do not apply to transactions that occur outside the United States. According to the court, the place in which a securities transaction occurs is decisive when determining the jurisdiction of lawsuits under the antifraud provisions, regardless of the fact that the transaction may have some effects within the United States. The court's opinion is available at 2010 WL 2518523.

The *Morrison* case

The plaintiffs in *Morrison* were Australians who contended that they were the victims of securities fraud as a result of their purchases of stock of National Australia Bank, Ltd. (NAB) prior to a decline in NAB's stock price resulting from NAB's announcement of write-downs of over $2 billion in the value of assets held by a U.S. subsidiary. The plaintiffs said that they were deceived by the subsidiary's manipulations of financial models, known to NAB and its CEO, that made the subsidiary's assets appear more valuable than they were. Despite the fact that the plaintiffs did not purchase their NAB securities in the U.S., they argued that the antifraud provisions applied on the basis of decisions by the U.S. Court of Appeals for the Second Circuit and other Circuit Courts. These decisions held that the antifraud provisions have extraterritorial application where wrongful conduct relating to securities transactions (1) had a substantial effect in the U.S. or upon U.S. citizens (the "effects test"), or (2) occurred in the U.S. (the "conduct test"). The Court did not agree, for the reasons described below.

The Court's Reasoning

Although the Supreme Court agreed unanimously (except for Justice Sotomayor, who did not participate in the decision) with two lower courts that the case should be dismissed for failure to state a claim, a majority of its members rejected the Second Circuit's "conduct" and

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"effects" analysis. (Justices Stevens and Ginsburg felt that such an analysis was a valid way of approaching the extraterritoriality issue, while Justice Breyer believed the alleged fraudulent actions failed on their face to meet the jurisdictional standards for a fraud claim.) The majority opinion written by Justice Scalia focused on the statute's text, which is silent on the question of extraterritorial application, and on the longstanding presumption that U.S. laws "apply only within the territorial jurisdiction of the United States." The Court held that only a clear Congressional intent to the contrary can overcome this presumption. Based on its examination of the statute, the Court concluded that "there is no affirmative indication in the Exchange Act that Section 10(b) applies extraterritorially," and therefore held that it did not. The Court added that the same result necessarily applied to Rule 10b-5 because the rule springs from Section 10(b).

The Court rejected the plaintiffs' argument that domestic conduct in the form of the allegedly fraudulent activities of NAB's U.S. subsidiary warranted application of the antifraud provisions. According to the Court, it is rare for a case alleging fraud under Section 10(b) and Rule 10b-5 not to involve some activity in the United States. But, in its view, "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case." Instead, the focus of the Exchange Act "is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." Moreover, the Court did not believe that Section 10(b) was intended to deter deceptive domestic conduct related to foreign securities transactions. Indeed, it expressed in this regard the concern that "While there is no reason to believe that the United States has become the Barbary Coast for those perpetrating frauds on foreign securities markets, some fear that it has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets."

The Effects of the Court's Decision

Some of the effects of the Court's decision under the federal securities laws are likely to be the following:

- **All provisions of the securities laws will be affected by the decision.** The court's ruling that a statute is presumed not to have extraterritorial reach unless a specific intent to the contrary is expressed in it is a broad one that applies to all federal statutes. Some provisions of the federal securities laws apply specifically to transactions outside the U.S., such as Section 30(a) of the Exchange Act relating to transactions by brokers and dealers on foreign exchanges. Others lacking such specificity will now be presumed to be operative only with respect to securities transactions in the U.S.

- **A reduction in potential damages from class action securities fraud lawsuits is likely.** The
exposure of defendants to damages in class action lawsuits alleging fraud could be reduced significantly by the elimination of potential members of the class who acquired their securities outside the U.S. The number of such suits also might decline as a result of the potential damages being reduced to the point where they are too small to warrant the cost and effort of a class action suit.

- **Some foreign issuers may decide not to have their shares trade in the United States.** Now that it has been established that only transactions that occur in the U.S. are subject to the antifraud provisions, some issuers may deem it advisable to eliminate their exposure to liability under those provisions by not having their securities listed for trading here.

- **Foreign issuers which have ADRs traded in the U.S. will still be exposed to fraud claims.** Many foreign issuers offer and sell American Depositary Receipts (ADRs) for their securities in U.S. markets. Because these transactions occur within the U.S., they will continue to be subject to potential claims that the antifraud provisions were violated. Foreign issuers also could face possible civil liability as controlling persons and could be charged in SEC enforcement actions with aiding and abetting securities law violations in the United States. But transactions that occur on foreign exchanges or other venues outside the U.S. should be beyond the jurisdiction of the antifraud provisions. Although no redress may be available under federal law, it may be possible for aggrieved foreign buyers or sellers to sue in state courts under state laws that are based on the effects or conduct of the interested parties in those states.

- **Some openings for lawsuits may exist where the location of a transaction is not explicit.** The Court said that "Only transactions in securities listed on domestic exchanges, and domestic transactions in other securities" are covered by the antifraud provisions of Section 10(b) and Rule 10b-5. Where a transaction did not take place on a securities exchange, uncertainty may exist regarding its location. For example, if the seller is in the U.S. and the buyer is in a foreign country and the securities are delivered to the buyer, there may be a question whether the transaction took place in the United States. A similar issue could be raised regarding book entry transactions. In these questionable situations, the uncertainty might be minimized by having the parties specify in writing the locus of the transaction prior to its occurrence.

- **Congress could amend the Exchange Act to extend the reach of the antifraud provisions.** Congress remains free to change the result in *Morrison* by adding to the Exchange Act what the Court found to be missing: a clear expression of
intent that the antifraud provisions apply extraterritorially. As Justice Steven’s concurring opinion pointed out, there is precedent for congressional action of that nature following a 1991 decision, *EEOC v. Arabian American Oil Co.*, that limited the extraterritorial application of federal employment law.
You can almost hear them now, rattling their spears outside every bank in the state. They are the class action barbarians, and they're here to sue you. About what? Overdraft fees.

Several class action suits have been filed alleging unfair practices concerning overdraft fees. One such suit - a $300 million action against Wells Fargo - is already in trial and closing arguments have been scheduled for July 9. If the plaintiffs succeed against Wells Fargo, financial institutions can expect a flood of “me too” class actions targeting other players in the industry. Indeed, just in the last few months, several other banks have been sued in copycat suits.

So, what's the dispute? The most controversial practice is resequencing - that is, the practice of deducting same-day debit card transactions from account balances starting with the largest transaction first (rather than deducting the debits in the order they were made). The result of resequencing is that a customer may be charged several overdraft fees on the same day, rather than being charged a single fee (as might be the result if the debits were deducted in the order they were made).

Other allegedly unfair practices challenged by the overdraft fee class actions include (i) failing to provide customers adequate notice of their right to opt out of overdraft protection plans, (ii) failing to provide customers notice - at the ATM or point of sale - that a specific transaction would result in an overdraft (thus giving the customer a chance to avoid the overdraft fee), and (iii) misleading advertising of overdraft protection plans.

What can financial institutions do to protect themselves? Here are a few tips:

1. Ensure compliance with the impending revisions to Regulation E concerning customer consent and “opt in” protections for overdraft protection plans. These new regulations go into effect on July 1 (see below for more details).

2. Check your overdraft practices against the Treasury Department's “best practices” guidelines for overdraft protection plans. Deviations from these best practices will only provide fodder for class action suits.

3. Consider revising or abandoning overdraft protection practices that create liability risk. For example, Chase announced last September that it would begin processing debit transactions in the order received, rather than resequencing them by size. And in March of this year, Bank of America announced that it would discontinue overdraft fees on debit transactions.
Regulation E Update.

In response to public demand for more consumer protection regarding overdraft fees, on November 17, 2009, the Federal Reserve System (the “Board”) adopted final rules amending Regulation E (12 C.F.R. § 205.1., *et seq.*) The amended Regulation E helps consumers understand how overdraft services operate and ensures that consumers have the opportunity to limit the overdraft costs associated with ATM and one-time debit card transactions. The amendments - which go into effect on July 1, 2010 - only apply to overdraft fees imposed on ATM and one-time debit card transactions; they do not apply to checking, ACH, and recurring debit card transactions.

Here are the high points of the new rules:

1. Financial institutions may not charge consumers fees for paying overdrafts on ATM and one-time debit card transactions that overdraw on the account, unless a consumer affirmatively consents, or opts in, to the overdraft services for those types of transactions. The opt-in requirements applies to all consumers, including existing and new account holders.

2. Financial institutions must provide consumers a written notice that explains the financial institution’s overdraft services, including fees associated with the service, and the consumer’s choices.

3. The consumer must opt in, or affirmatively consent, to the financial institution’s overdraft services before overdraft fees may be assessed on the consumer’s account for the financial institution’s honoring overdrafts. A copy of a model opt-in notice provided by the Board can be accessed following this e-Update.

4. Financial institutions may not tie or condition the payment of overdrafts for checks and other transactions to the consumer opting into the overdraft service for ATM and one-time debit card transactions.

5. Financial institutions cannot discriminate against consumers who do not opt in. Financial institutions must provide consumers who do not opt in with the same account terms, conditions, and features (including pricing) that they provide to consumers who do opt in.
What You Need to Know about Overdrafts and Overdraft Fees

An overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway. We can cover your overdrafts in two different ways:

1. We have standard overdraft practices that come with your account.
2. We also offer overdraft protection plans, such as a link to a savings account, which may be less expensive than our standard overdraft practices. To learn more, ask us about these plans.

This notice explains our standard overdraft practices.

➢ What are the standard overdraft practices that come with my account?

We do authorize and pay overdrafts for the following types of transactions:

- Checks and other transactions made using your checking account number
- Automatic bill payments

We do not authorize and pay overdrafts for the following types of transactions unless you ask us to (see below):

- ATM transactions
- Everyday debit card transactions

We pay overdrafts at our discretion, which means we do not guarantee that we will always authorize and pay any type of transaction.

If we do not authorize and pay an overdraft, your transaction will be declined.

➢ What fees will I be charged if [Institution Name] pays my overdraft?

Under our standard overdraft practices:

- We will charge you a fee of up to $30 each time we pay an overdraft.
- Also, if your account is overdrawn for 5 or more consecutive business days, we will charge an additional $5 per day.
- There is no limit on the total fees we can charge you for overdrawing your account.

➢ What if I want [Institution Name] to authorize and pay overdrafts on my ATM and everyday debit card transactions?

If you also want us to authorize and pay overdrafts on ATM and everyday debit card transactions, call [telephone number], visit [Web site], or complete the form below and [present it at a branch][mail it to]:

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___ I do not want [Institution Name] to authorize and pay overdrafts on my ATM and everyday debit card transactions.

___ I want [Institution Name] to authorize and pay overdrafts on my ATM and everyday debit card transactions.

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Printed Name: _________________________
Date: _________________________
[Account Number]: _______________________
TARGETING EMPLOYERS FOR GENDER-BASED PAY AND PROMOTION DISCRIMINATION: THE NEXT BIG THING?

Preventing and defending claims of gender-based pay and promotion discrimination is fast emerging as the latest challenge for employers seeking to reduce litigation risks. That these claims could be “the next big thing” is clear from recent jury verdicts, pending legislation in Congress, and headline-grabbing court decisions:

• The Ninth Circuit affirmed class action certification of the largest gender-discrimination class in the country’s history based on Wal-Mart’s allegedly discriminatory subjective pay and promotion practices.

• A jury in the Southern District of New York found Novartis Pharmaceutical Corporation liable for three class-wide issues of pay, promotion, and pregnancy discrimination in a suit brought on behalf of 5,600 female sales employees, and subsequently awarded the plaintiffs $250 million in punitive damages.

• President Obama has emphasized that closing the wage gap is a central initiative for his administration and both the president and Congress are promoting legislation, including the Paycheck Fairness Act, in an effort to close the wage gap.

These court decisions and legislative initiatives raise the specter of a flood of class claims against employers for pay and promotion discrimination. There are, however, steps employers can take to minimize their risks.

The Largest Gender-Discrimination Lawsuit in U.S. History: Dukes v. Wal-Mart

On April 26, 2010, the U.S. Court of Appeals for the Ninth Circuit affirmed in large part a district court’s certification of an employment-discrimination class action involving at least 500,000 (and potentially 1.5 million) female Wal-Mart employees alleging gender bias in pay and promotions in violation of Title VII of the Civil Rights Act of 1964. The class encompasses both salaried and hourly employees in positions ranging from a salaried store manager to an hourly personnel clerk, demonstrating that “mere size does not render a case unmanageable.” The case, Dukes v. Wal-Mart Stores, Inc. (Dukes), is the largest gender-discrimination lawsuit in U.S. history, and increases the likelihood that similar actions will be filed against employers nationwide.

In reaching its decision to certify the class, the lower court held that Wal-Mart’s pay and promotion decisions were largely subjective and made within a broad range of discretion by store managers (“a common feature which provides a wide enough conduit for gender bias to potentially seep into the system”). The Ninth Circuit subsequently affirmed the trial court’s finding, based on an adverse impact theory, where the allegedly discriminatory practice was the decentralized decision-making process and “excessive subjectivity” regarding pay and promotions.

Ironically, despite the discretion Wal-Mart’s managers had in making pay and promotion decisions, the court found that the subjectivity involved in the decision making supported commonality findings. It did so because the discrimination the plaintiffs claim to have suffered occurred through a consistent corporate policy (i.e., “excessively subjective decision making in a corporate culture of uniformity and gender stereotyping”), as demonstrated by anecdotal and statistical evidence and expert testimony.

The consequences of the Dukes decision are significant:

• Subjective pay and promotion practices are more likely to be the target of wage-discrimination cases.

• The decision opens the door to more adverse impact class actions, potentially on a larger scale, whether based on gender, race, age, or other protected classes. Plaintiff’s lawyers will cite this case to support their argument that lawsuits similar to this can proceed even if based on broad and conclusory allegations, a few anecdotes, and statistical disparities.

• Based on the Ninth Circuit’s willingness to certify such a large class, employers can anticipate an increase in large-scale class action litigation.

Incidentally, after the Ninth Circuit issued its opinion, news reports surfaced stating that six years before the filing of the Dukes case, Wal-Mart actually had hired a law firm to examine Wal-Mart’s vulnerability to a sex-
Targeting Employers for Gender-Based Pay . . .

Continued from page 1...

discrimination lawsuit. According to these accounts, the report examined gender disparities and warned that the disparities were “statistically significant.” It remains unclear whether the allegedly privileged trial. Wal-Mart, however, has issued a public statement dismissing the report’s results and taking the position that it had no bearing on or relevance to the Dukes case.


On May 17, 2010, a federal jury in the Southern District of New York found Novartis Pharmaceutical Corporation liable on 12 different gender-bias-related claims, including denial of promotions, unequal pay, pregnancy discrimination, sexual harassment, hostile work environment, and retaliation (Velez v. Novartis Corp.). In addition to awarding $3.37 million in compensatory damages to the 12 class representatives, the jury also awarded $250 million in punitive damages, equivalent to nearly 3 percent of Novartis’ 2009 revenues. The jury also found Novartis liable on three class-wide claims for engaging in a pattern of discrimination against women in its pay, promotion, and leave practices. It is estimated that Novartis could end up paying up to $1 billion overall once damages are calculated for the remainder of the 5,600-person class.

While the damages award alone is noteworthy, the Novartis decision—the largest gender-discrimination case ever to go to trial in the U.S.—also highlights employers’ obligations and risks regarding gender-based pay equity, and is likely to generate similar lawsuits. Notwithstanding, Novartis provides useful lessons for all employers seeking to reduce their litigation risks:

• Limit unfettered or unstructured subjectivity in hiring and promotion practices. Faced with certain damaging statistics (i.e., despite more equal numbers of males and females among sales representatives, 77 percent of the entry-level sales managers were males), it was exceedingly difficult for Novartis to argue that no covert bias existed in its subjective and “intangible” review and promotion practices. The danger with such unstructured policies is: (1) without some predetermined structure and criteria to review promotion processes, it is difficult to defend against claims that the subconscious biases of individual managers seep into the employment decision, and (2) it is more difficult to defend such unstructured processes and to later prove that managers based their decisions on objectively reasonable job-related criteria that are based on business necessity.

• Avoid diversity initiatives and programs that appear to be merely “paper policies.” While Novartis instituted a “Women in Leadership” management-development program, the plaintiffs alleged that it simply amounted to sending the message to women that if they wanted to “play with the boys, you have to be one of the boys.” While not clear from the facts of the case, it appears that the plaintiffs maintained at trial that the company failed to take seriously the program’s purposes with regard to the advancement of women within the company, possibly ignored proposed solutions or recommendations made by the program, and ignored gender-related complaints voiced by women in the program.

• Ensure appropriate follow-up and resolution in any grievance-reporting policy. Trial testimony showed that females believed Novartis discouraged them from complaining to human resources, and that those who did complain received little or no response. Novartis’ director of human resources admitted that employees did not receive harassment and discrimination training that provided guidance on how to file an internal discrimination complaint.

• Take prompt action once management learns about discrimination and harassment. One of the most damaging pieces of evidence in Novartis was that in 2003 (one year prior to the lawsuit), Novartis hired a consultant to investigate internal discrimination and harassment. The resulting report revealed “significant gender discrimination,” and included reports of inappropriate language and gestures from men, general disregard for women’s opinions, lack of oversight of mostly male managers, and an inadequate grievance procedure. Novartis failed to enact meaningful reform or take significant action as a result of the report.

• Be aware of how distinct employment issues are interrelated and can “snowball” from one case to another. Roughly two years after the Novartis complaint, Novartis was hit with three additional class action lawsuits, alleging that the company deliberately misclassified its sales representatives as exempt from federal and state overtime laws. The named plaintiffs in the wage and hour class actions are represented by the same attorneys representing the class in Novartis, and presumably received documents during discovery that revealed potential misclassification issues. Employers must recognize that gender-bias lawsuits also may lead to additional wage and hour lawsuits (and vice versa) as plaintiffs gain access to company payroll information through the discovery process.

A More Muscular and Formidable Equal Pay Act: The Paycheck Fairness Act

Already passed by the House of Representatives, and currently pending before the Senate, the Paycheck Fairness Act (PFA) amends the Equal Pay Act of 1963 (EPA) to provide stronger remedies and procedures for gender-based wage-discrimination claims, and to require more active federal government involvement in combating wage
Targeting Employers for Gender-Based Pay . . .

Continued from page 2...

disparities. Passage of the Senate bill is likely given the strong backing by non-partisan groups, including the American Bar Association.

Although both the EPA and Title VII already provide for two federal causes of action based on gender-based pay inequities, plaintiffs tend to prefer Title VII both for its remedial and procedural heft. By contrast, the EPA offers an easier standard of proof than Title VII, as it does not require a plaintiff to prove “an intent” to discriminate. The passage of the PFA would combine the remedial strength and procedural muscle of Title VII with the lower standard of proof of the EPA to create a new and potentially attractive statutory vehicle for plaintiffs pursuing individual- and class-based gender-discrimination claims.

Specifically, the PFA does the following:

• **Expands remedies offered by the EPA:** The PFA toughens the remedy provision of the EPA (currently limited to liquidated damages and back-pay awards) by allowing prevailing plaintiffs to recover compensatory and punitive damages (already available under Title VII).

• **Encourages class actions:** The PFA adopts the “opt out” rule (i.e., that potential class members automatically are considered part of the class until they choose to opt out), which increases the likely number of class members in any such action.

• **Narrows employer defense:** Under the EPA, an employer must prove an affirmative defense that the pay differential is based broadly on a “factor other than sex.” The PFA narrows this defense to require that an employer show that the differential is: (1) based on a bona fide factor, such as education, training, or experience, that is not based upon or derived from a gender-based differential; (2) job-related to the position in question; and (3) consistent with business necessity.

• **Expands anti-retaliation provisions:** In addition to clarifying that employees are protected from retaliation when making claims, the PFA also would prohibit retaliation against employees who inquire about employers’ wage practices or disclose their own wages. Some states, including California, already prohibit employers from preventing employees from disclosing the amount of their wages or from retaliating against an employee for doing so.

• **Permits claims previously precluded under current case law:** Contrary to certain cases that interpreted the “establishment” provision of the EPA to preclude comparisons between wages paid in different facilities or offices of the same employer, the PFA explicitly provides that comparisons may be made between employees in offices in the same county or similar political subdivisions, as well as between broader groups of offices in some circumstances.

• **Gives federal government new authority to collect compensation data:** The PFA requires the Equal Employment Opportunity Commission (EEOC) to survey available pay data and issue regulations within 18 months that require employers to submit any needed pay data identified by the race, sex, and national origin of employees. The PFA also reinstates the collection of gender- and race-based data in the Equal Opportunity Survey, and sets standards for conducting systemic wage-discrimination analyses by the Office of Federal Contract Compliance (OFCCP). In addition, the act reinstates the OFCCP’s “pay grade” methodology for use in investigations, which assumes that any pay disparities between employees in the same pay grade are attributable to a discriminatory payroll practice.

President Obama’s Promise to Solve the Gender Pay Gap

Since taking office in 2009, the Obama administration aggressively has targeted the equal-pay issue. In his January 2010 State of the Union address, President Obama reiterated his administration’s focus on gender pay disparity, noting that, “We’re going to crack down on violations of equal pay laws—so that women get equal pay for an equal day’s work.” To that end, the Obama administration has implemented the following initiatives:

• **The Lilly Ledbetter Fair Pay Act of 2009.** The act, which supersedes the Supreme Court’s decision in Ledbetter v. Goodyear Tire & Rubber Co., clarifies that the statute of limitations for filing an equal-pay lawsuit for discriminatory pay resets with each new allegedly discriminatory paycheck.

• **EEOC focus on gender-based discrimination.** Following a 30 percent increase in gender-based wage complaints to the EEOC, the Obama administration proposed an $18 million budget increase for 2011, including the hiring of 100 new EEOC investigators to aid enforcement, likely resulting in a greater number of gender-based lawsuits.

• **DOL emphasis on eradication of pay inequality.** The Department of Labor’s (DOL’s) plans to tackle the issue of gender pay inequity include the OFCCP’s renewed emphasis on the identification and eradication of gender-based discrimination for federal contractors and the Women’s Bureau’s focus on increasing women’s incomes, narrowing the wage gap, and reducing income inequality.

• **National Equal Pay Enforcement Task Force.** The administration has formalized the collaboration between the EEOC, the DOL, the Department of

Continued on page 4...
Justice’s Civil Rights Division, and the Office of Personnel Management to “ensure the most rigorous enforcement possible” of equal-pay laws.

Lower Your Risk Factors

The preceding examples underscore the importance of strong and consistent HR policies and practices. While no strategy is foolproof, the following preventative measures will help lower your company’s litigation risk profile:

1. Use a consistent and structured process with managed and controlled questions to avoid excessive “subjectivity” in pay and promotion decisions.

2. Proactively respond to disparities or inequities found in your company’s payroll practices and confront your areas of vulnerability.

3. Conduct regular anti-harassment and discrimination trainings—effective training will include how to avoid claims for discrimination and retaliation.

4. Exercise care in permitting, funding, and supporting diversity initiatives and groups, as adverse inferences may be drawn if groups are not supported or treated seriously, their concerns or reports are ignored, they are denied funding upon request, or they receive different treatment.

5. Take every internal complaint seriously and provide a prompt, appropriate, and complete response.

6. Assess the reputation of your industry for assumptions of gender bias and take steps to present a culture of equality at your company.

7. Where appropriate, take steps to protect internal company communications concerning complaints by employees, or any internal evaluations of employment practices, with the attorney-client privilege by contacting in-house counsel or Wilson Sonsini Goodrich & Rosati employment counsel.

For more information about legal issues regarding gender-based pay claims, please contact Fred Alvarez, Kristen Dumont, Laura Merritt, Ulrico Rosales, Marina Tsatalis, or another member of the firm’s employment law practice.